

UNITED STATES DEPARTMENT OF THE INTERIOR

Oscar L. Chapman, *Secretary*

**DECISIONS  
OF THE  
DEPARTMENT OF THE INTERIOR**

Edited by  
ETHEL B. FOLAND



**VOLUME 59**  
JANUARY 1945-JUNE 1947

UNITED STATES GOVERNMENT PRINTING OFFICE, WASHINGTON, 1952

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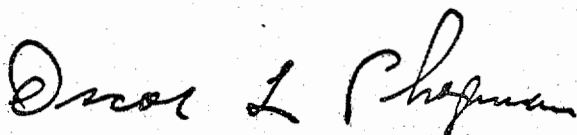
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## PREFACE

The present volume of the Decisions of the Department of the Interior covers the period from January 1, 1945, to June 30, 1947. It includes the most important administrative decisions and legal opinions that were rendered by officials of the Department during the period.

The Honorable Harold L. Ickes and the Honorable J. A. Krug served successively as Secretary of the Interior during the period covered by this volume; Mr. Abe Fortas and the undersigned served successively as Under Secretary of the Interior; Messrs. Michael W. Straus, Warner W. Gardner, C. Girard Davidson, and the undersigned served as Assistant Secretary of the Interior; and Messrs. Fowler V. Harper, Warner W. Gardner, and Mastin G. White served successively as Solicitor of the Department of the Interior.

This volume will be cited within the Department of the Interior as "59 I. D."

  
*Secretary of the Interior.*

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- Freeman, Flossie* (40 L. D. 106); overruled, 41 L. D. 63.
- Freeman v. Texas and Pacific Ry. Co.* (2 L. D. 550); overruled, 7 L. D. 18.
- Fry, Silas A.* (45 L. D. 20); modified, 51 L. D. 581.
- Galliher, Maria* (8 C. L. O. 137); overruled, 1 L. D. 57.
- Gallup v. Northern Pacific Ry. Co.* (unpublished); overruled so far as in conflict, 47 L. D. 304.
- Gariss v. Borin* (21 L. D. 542). (See 39 L. D. 162, 225.)
- Garrett, Joshua* (7 C. L. O. 55); overruled, 5 L. D. 158.
- Garvey v. Tuiska* (41 L. D. 510); modified, 43 L. D. 229.
- Gates v. California and Oregon R. R. Co.* (5 C. L. O. 150); overruled, 1 L. D. 336.
- Gauger, Henry* (10 L. D. 221); overruled, 24 L. D. 81.
- Gleason v. Pent* (14 L. D. 375; 15 L. D. 286); vacated, 53 I. D. 447; overruled so far as in conflict, 59 I. D. 416, 422.

- Gohrman *v.* Ford (8 C. L. O. 6); overruled so far as in conflict, 4 L. D. 580.
- Golden Chief "A" Placer Claim (35 L. D. 557); modified, 37 L. D. 250.
- Goldstein *v.* Juneau Townsite (23 L. D. 417); vacated, 31 L. D. 88.
- Goodale *v.* Olney (12 L. D. 324); distinguished, 55 I. D. 580.
- Gotebo Townsite *v.* Jones (35 L. D. 18); modified, 37 L. D. 560.
- Gowdy *v.* Connell (27 L. D. 56); vacated, 28 L. D. 240.
- Gowdy *v.* Gilbert (19 L. D. 17); overruled, 26 L. D. 453.
- Gowdy et al. *v.* Kismet Gold Mining Co. (22 L. D. 624); modified, 24 L. D. 191.
- Gramplan Lode (1 L. D. 544); overruled, 25 L. D. 495.
- Gregg et al. *v.* State of Colorado (15 L. D. 151); modified, 30 L. D. 310.
- Grinnell *v.* Southern Pacific R. R. Co. (22 L. D. 438); vacated, 23 L. D. 489.
- \*Ground Hog Lode *v.* Parole and Morning Star Lodes (8 L. D. 430); overruled, 34 L. D. 568. (See R. R. Rousseau, 47 L. D. 590.)
- Guidney, Alcide (8 C. L. O. 157); overruled, 40 L. D. 399.
- Gulf and Ship Island R. R. Co. (16 L. D. 236); modified, 19 L. D. 534.
- Gustafson, Olof (45 L. D. 456); modified, 46 L. D. 442.
- Halvorson, Halvor K. (39 L. D. 456); overruled, 41 L. D. 505.
- Hamilton, Hiram M. (54 I. D. 36); Instructions (51 L. D. 51) overruled so far as in conflict.
- Hansbrough, Henry C. (5 L. D. 155); overruled, 29 L. D. 59.
- Hardee, D. C. (7 L. D. 1); overruled so far as in conflict, 29 L. D. 698.
- Hardee *v.* United States (8 L. D. 391; 16 L. D. 499); overruled so far as in conflict, 29 L. D. 698.
- Hardin, James A. (10 L. D. 313); revoked, 14 L. D. 233.
- Harris, James G. (28 L. D. 90); overruled, 39 L. D. 93.
- Harrison, Luther (4 L. D. 179); overruled, 17 L. D. 216.
- Harrison, W. R. (19 L. D. 299); overruled, 33 L. D. 539.
- Hart *v.* Cox (42 L. D. 592); vacated, 260 U. S. 427. (See 49 L. D. 413.)
- Hastings and Dakota Ry. Co. *v.* Christenson et al. (22 L. D. 257); overruled, 28 L. D. 572.
- Hausman, Peter A. C. (37 L. D. 352); modified, 48 L. D. 629.
- Hayden *v.* Jamison (24 L. D. 403); vacated, 26 L. D. 373.
- Haynes *v.* Smith (50 L. D. 208); overruled so far as in conflict, 54 I. D. 150.
- Heilman *v.* Syverson (15 L. D. 184); overruled, 23 L. D. 119.
- Heinzman et al. *v.* Letroadec's Heirs et al. (28 L. D. 497); overruled, 38 L. D. 253.
- Heirs of Davis (40 L. D. 573); overruled, 46 L. D. 110.
- Heirs of Philip Mulnix (33 L. D. 331); overruled, 43 L. D. 532.
- \*Heirs of Stevenson *v.* Cunningham (32 L. D. 650); overruled so far as in conflict, 41 L. D. 119. (See 43 L. D. 196.)
- Heirs of Talkington *v.* Hempfling (2 L. D. 46); overruled, 14 L. D. 200.
- Heirs of Vradenburg et al. *v.* Orr et al. (25 L. D. 323); overruled, 38 L. D. 253.
- Helmer, Inkerman (34 L. D. 341); modified, 42 L. D. 472.
- Helphrey *v.* Coil (49 L. D. 624); overruled, Dennis *v.* Jean (A-20899), July 24, 1937, unreported.
- Henderson, John W. (40 L. D. 518); vacated, 43 L. D. 106. (See 44 L. D. 112, and 49 L. D. 484.)
- Hennig, Nellie J. (38 L. D. 443, 445); recalled and vacated, 39 L. D. 211.
- Herman *v.* Chase et al. (37 L. D. 590); overruled, 43 L. D. 246.
- Herrick, Wallace H. (24 L. D. 23); overruled, 25 L. D. 113.
- Hess, Hoy, Assignee (46 L. D. 421); overruled, 51 L. D. 287.
- Hickey, M. A., et al. (3 L. D. 83); modified, 5 L. D. 256.

- Hildreth, Henry (45 L. D. 464); vacated, 46 L. D. 17.
- Hindman, Ada I. (42 L. D. 327); vacated in part, 43 L. D. 191.
- Hoglund, Svan (42 L. D. 405); vacated, 43 L. D. 538.
- Holden, Thomas A. (16 L. D. 493); overruled, 29 L. D. 166.
- Holland, G. W. (6 L. D. 20); overruled, 6 L. D. 639; 12 L. D. 436.
- Holland, William C. (M. 27696), decided April 26, 1934; overruled in part, 55 I. D. 221.
- Hollensteiner, Walter (38 L. D. 319); overruled, 47 L. D. 260.
- Holman v. Central Montana Mines Co. (34 L. D. 568); overruled so far as in conflict, 47 L. D. 590.
- Hon v. Martinas (41 L. D. 119); modified, 43 L. D. 197.
- Hooper, Henry (6 L. D. 624); modified, 9 L. D. 86, 284.
- Howard, Thomas (3 L. D. 409). (See 39 L. D. 162, 225.)
- Howard v. Northern Pacific R. R. Co. (23 L. D. 6); overruled, 28 L. D. 126.
- Howell, John H. (24 L. D. 35); overruled, 28 L. D. 204.
- Howell, L. C. (39 L. D. 92). (See 39 L. D. 411.)
- Hoy, Assignee of Hess (46 L. D. 421); overruled, 51 L. D. 287.
- Hughes v. Greathead (43 L. D. 497); overruled, 49 L. D. 413. (See 260 U. S. 427.)
- Hull et al. v. Ingle (24 L. D. 214); overruled, 30 L. D. 258.
- Huls, Clara (9 L. D. 401); modified, 21 L. D. 377.
- Hyde, F. A. (27 L. D. 472); vacated, 28 L. D. 284.
- Hyde, F. A. et al. (40 L. D. 284); overruled, 43 L. D. 381.
- Hyde et al. v. Warren et al. (14 L. D. 576; 15 L. D. 415). (See 19 L. D. 64.)
- Ingram, John D. (37 L. D. 475). (See 43 L. D. 544.)
- Inman v. Northern Pacific R. R. Co. (24 L. D. 318); overruled, 28 L. D. 95.
- Instructions (32 L. D. 604); overruled so far as in conflict, 50 L. D. 628; 53 I. D. 365; Lillian M. Peterson et al. (A. 20411), August 5, 1937, unreported. (See 59 I. D. 282, 286.)
- Interstate Oil Corporation and Frank O. Chittenden (50 L. D. 262); overruled so far as in conflict, 53 I. D. 228.
- Iowa Railroad Land Co. (23 L. D. 79; 24 L. D. 125); vacated, 29 L. D. 79.
- Jacks v. Belard et al. (29 L. D. 369); vacated, 30 L. D. 345.
- Jackson Oil Co. v. Southern Pacific Ry. Co. (40 L. D. 528); overruled, 42 L. D. 317.
- Johnson v. South Dakota (17 L. D. 411); overruled so far as in conflict, 41 L. D. 22.
- Jones, James A. (3 L. D. 176); overruled, 8 L. D. 448.
- Jones v. Kennett (6 L. D. 688); overruled, 14 L. D. 429.
- Kackmann, Peter (1 L. D. 86); overruled, 16 L. D. 464.
- Kanawha Oil and Gas Co., Assignee (50 L. D. 639); overruled so far as in conflict, 54 I. D. 371.
- Kemper v. St. Paul and Pacific R. R. Co. (2 C. L. L. 805); overruled, 18 L. D. 101.
- Kilner, Harold E. et al. (A. 21845), February 1, 1939, unreported; overruled so far as in conflict, 59 I. D. 258, 260.
- King v. Eastern Oregon Land Co. (23 L. D. 579); modified, 30 L. D. 19.
- Kinney, E. C. (44 L. D. 580); overruled so far as in conflict, 53 I. D. 228.
- Kinsinger v. Peck (11 L. D. 202). (See 39 L. D. 162, 225.)
- Kiser v. Keech (7 L. D. 25); overruled, 23 L. D. 119.
- Knight, Albert B., et al. (30 L. D. 227); overruled, 31 L. D. 64.
- Knight v. Heirs of Knight (39 L. D. 362, 491; 40 L. D. 461); overruled, 43 L. D. 242.



- Kniskern v. Hastings and Dakota R. Co.* (6 C. L. O. 50); overruled, 1 L. D. 362.
- Kolberg, Peter F.* (37 L. D. 453); overruled, 43 L. D. 181.
- Krigbaum, James T.* (12 L. D. 617); overruled, 26 L. D. 448.
- Krushnic, Emil L.* (52 L. D. 282, 295); vacated, 53 L. D. 42, 45. (See 280 U. S. 306.)
- Lackawanna Placer Claim* (36 L. D. 36); overruled, 37 L. D. 715.
- La Pollette, Harvey M.* (26 L. D. 453); overruled so far as in conflict, 59 L. D. 416, 422.
- Lamb v. Ullery* (10 L. D. 528); overruled, 32 L. D. 331.
- Largent, Edward B., et al.* (13 L. D. 397); overruled so far as in conflict, 42 L. D. 321.
- Larson, Syvert* (40 L. D. 69); overruled, 43 L. D. 242.
- Lasselle v. Missouri, Kansas and Texas Ry. Co.* (3 C. L. O. 10); overruled, 14 L. D. 278.
- Las Vegas Grant* (13 L. D. 646; 15 L. D. 58); revoked, 27 L. D. 683.
- Laughlin, Allen* (31 L. D. 256); overruled, 41 L. D. 361.
- Laughlin v. Martin* (18 L. D. 112); modified, 21 L. D. 40.
- Law v. State of Utah* (29 L. D. 623); overruled, 47 L. D. 359.
- Lemmons, Lawson H.* (19 L. D. 37); overruled, 26 L. D. 389.
- Leonard, Sarah* (1 L. D. 41); overruled, 16 L. D. 464.
- Lindberg, Anna C.* (3 L. D. 95); modified, 4 L. D. 299.
- Linderman v. Wait* (6 L. D. 689); overruled, 13 L. D. 459.
- \**Linhart v. Santa Fe Pacific R. R. Co.* (36 L. D. 41); overruled, 41 L. D. 284. (See 43 L. D. 536.)
- Little Pet Lode* (4 L. D. 17); overruled, 25 L. D. 550.
- Lock Lode* (6 L. D. 105); overruled so far as in conflict, 26 L. D. 123.
- Lockwood, Francis A.* (20 L. D. 361); modified, 21 L. D. 200.
- Lonergan v. Shockley* (33 L. D. 238); overruled so far as in conflict, 34 L. D. 314; 36 L. D. 199.
- Louisiana, State of* (8 L. D. 126); modified, 9 L. D. 157.
- Louisiana, State of* (24 L. D. 231); vacated, 26 L. D. 5.
- Louisiana, State of* (47 L. D. 366); overruled so far as in conflict, 51 L. D. 291.
- Louisiana, State of* (48 L. D. 201); overruled so far as in conflict, 51 L. D. 291.
- Lucy B. Hussey Lode* (5 L. D. 93); overruled, 25 L. D. 495.
- Luton, James W.* (34 L. D. 468); overruled so far as in conflict, 35 L. D. 102.
- Lyman, Mary O.* (24 L. D. 493); overruled so far as in conflict, 43 L. D. 221.
- Lynch, Patrick* (7 L. D. 33); overruled so far as in conflict, 13 L. D. 713.
- Madigan, Thomas* (8 L. D. 188); overruled, 27 L. D. 448.
- Maginnis, Charles P.* (31 L. D. 222); overruled, 35 L. D. 399.
- Maginnis, John S.* (32 L. D. 14); modified, 42 L. D. 472.
- Maher, John M.* (34 L. D. 342); modified, 42 L. D. 472.
- Mahoney, Timothy* (41 L. D. 129); overruled, 42 L. D. 313.
- Makela, Charles* (46 L. D. 509); extended, 49 L. D. 244.
- Makemson v. Snider's Heirs* (22 L. D. 511); overruled, 32 L. D. 650.
- Malone Land and Water Co.* (41 L. D. 138); overruled in part, 43 L. D. 110.
- Maney, John J.* (35 L. D. 250); modified, 48 L. D. 153.
- Maple, Frank* (37 L. D. 107); overruled, 43 L. D. 181.
- Martin v. Patrick* (41 L. D. 284); overruled, 43 L. D. 536.
- Mason v. Cromwell* (24 L. D. 248); vacated, 26 L. D. 369.
- Masten, E. C.* (22 L. D. 337); overruled, 25 L. D. 111.
- Mather et al. v. Hackley's Heirs* (15 L. D. 487); vacated, 19 L. D. 48.

- Maughan, George W. (1 L. D. 25); overruled, 7 L. D. 94.
- Maxwell and Sangre de Cristo Land Grants (46 L. D. 301); modified, 48 L. D. 88.
- McBride v. Secretary of the Interior (8 C. L. O. 10); modified, 52 L. D. 33.
- McCalla v. Acker (29 L. D. 203); vacated, 30 L. D. 277.
- McCord, W. E. (23 L. D. 137); overruled to extent of any possible inconsistency, 56 L. D. 73.
- McCornick, William S. (41 L. D. 661, 666); vacated, 43 L. D. 429.
- \*McCraney v. Heirs of Hayes (33 L. D. 21); overruled so far as in conflict, 41 L. D. 119. (See 43 L. D. 196.)
- McDonald, Roy (34 L. D. 21); overruled, 37 L. D. 285.
- \*McDonogh School Fund (11 L. D. 378); overruled, 30 L. D. 616. (See 35 L. D. 399.)
- McFadden et al. v. Mountain View Mining and Milling Co. (26 L. D. 530); vacated, 27 L. D. 358.
- McGee, Edward D. (17 L. D. 285); overruled, 29 L. D. 166.
- McGrann, Owen (5 L. D. 10); overruled, 24 L. D. 502.
- McGregor, Carl (37 L. D. 693); overruled, 38 L. D. 148.
- McHarry v. Stewart (9 L. D. 344); criticized and distinguished, 56 L. D. 340.
- McKernan v. Bailey (16 L. D. 368); overruled, 17 L. D. 494.
- \*McKittrick Oil Co. v. Southern Pacific R. R. Co. (37 L. D. 243); overruled so far as in conflict, 40 L. D. 528. (See 42 L. D. 317.)
- McMicken, Herbert et al. (10 L. D. 97; 11 L. D. 96); distinguished, 58 L. D. 257, 260.
- McNamara et al. v. State of California (17 L. D. 296); overruled, 22 L. D. 666.
- McPeck v. Sullivan et al. (25 L. D. 281); overruled, 36 L. D. 26.
- \*Mee v. Hughart et al. (23 L. D. 455); vacated, 28 L. D. 209. In effect reinstated, 44 L. D. 414, 487; 46 L. D. 434; 48 L. D. 195, 346, 348; 49 L. D. 660.
- \*Meeboer v. Heirs of Schut (35 L. D. 335); overruled so far as in conflict, 41 L. D. 119. (See 43 L. D. 196.)
- Mercer v. Buford Townsite (35 L. D. 119); overruled, 35 L. D. 649.
- Meyer, Peter (6 L. D. 639); modified, 12 L. D. 436.
- Meyer v. Brown (15 L. D. 307). (See 39 L. D. 162, 225.)
- Midland Oilfields Co. (50 L. D. 620); overruled so far as in conflict, 54 L. D. 371.
- Miller, Edwin J. (35 L. D. 411); overruled, 43 L. D. 181.
- Miller v. Sebastian (19 L. D. 288); overruled, 26 L. D. 448.
- Milner and North Side R. R. Co. (36 L. D. 488); overruled, 40 L. D. 187.
- Milton et al. v. Lamb (22 L. D. 339); overruled, 25 L. D. 550.
- Milwaukee, Lake Shore and Western Ry. Co. (12 L. D. 79); overruled, 29 L. D. 112.
- Miner v. Mariott et al. (2 L. D. 709); modified, 28 L. D. 224.
- Minnesota and Ontario Bridge Company (30 L. D. 77); no longer followed, 50 L. D. 359.
- \*Mitchell v. Brown (3 L. D. 65); overruled, 41 L. D. 396. (See 43 L. D. 520.)
- Monitor Lode (18 L. D. 358); overruled, 25 L. D. 495.
- Monster Lode (35 L. D. 493); overruled so far as in conflict, 55 L. D. 348.
- Moore, Charles H. (16 L. D. 204); overruled, 27 L. D. 482.
- Morgan v. Craig (10 C. L. O. 234); overruled, 5 L. D. 303.
- Morgan v. Rowland (37 L. D. 90); overruled, 37 L. D. 618.
- Moritz v. Hinz (36 L. D. 450); vacated, 37 L. D. 382.
- Morrison, Charles S. (36 L. D. 126); modified, 36 L. D. 319.
- Morrow et al. v. State of Oregon et al. (32 L. D. 54); modified, 33 L. D. 101.
- Moses, Zelmer R. (36 L. D. 473); overruled, 44 L. D. 570.
- Mountain Chief Nos. 8 and 9 Lode Claims (36 L. D. 100); overruled in part, 36 L. D. 551.

- Mt. Whitney Military Reservation (40 L. D. 315). (See 43 L. D. 33.)
- Muller, Ernest (46 L. D. 243); overruled, 48 L. D. 163.
- Muller, Esberne K. (39 L. D. 72); modified, 39 L. D. 360.
- Mulnix, Philip, Heirs of (33 L. D. 331); overruled, 43 L. D. 532.
- Nebraska, State of (18 L. D. 124); overruled, 28 L. D. 358.
- Nebraska, State of, *v.* Dorrington (2 C. L. L. 647); overruled, 26 L. D. 123.
- Neilsen *v.* Central Pacific R. R. Co. et al. (26 L. D. 252); modified, 30 L. D. 216.
- Newbanks *v.* Thompson (22 L. D. 490); overruled, 29 L. D. 108.
- Newton, Robert C. (41 L. D. 421); overruled so far as in conflict, 43 L. D. 364.
- New Mexico, State of (46 L. D. 217); overruled, 48 L. D. 98.
- New Mexico, State of (49 L. D. 314); overruled, 54 L. D. 159.
- Newton, Walter (22 L. D. 322); modified, 25 L. D. 188.
- New York Lode and Mill Site (5 L. D. 513); overruled, 27 L. D. 373.
- \*Nickel, John R. (9 L. D. 388); overruled, 41 L. D. 129. (See 42 L. D. 313.)
- Northern Pacific R. R. Co. (20 L. D. 191); modified, 22 L. D. 224; overruled so far as in conflict, 29 L. D. 550.
- Northern Pacific R. R. Co. (21 L. D. 412; 23 L. D. 204; 25 L. D. 501); overruled, 53 I. D. 242. (See 26 L. D. 265; 33 L. D. 426; 44 L. D. 218; 177 U. S. 435.)
- Northern Pacific Ry. Co. (48 L. D. 573); overruled so far as in conflict, 51 L. D. 196. (See 52 L. D. 58.)
- Northern Pacific R. R. Co. *v.* Bowman (7 L. D. 238); modified, 18 L. D. 224.
- Northern Pacific R. R. Co. *v.* Burns (6 L. D. 21); overruled, 20 L. D. 191.
- Northern Pacific R. R. Co. *v.* Loomis (21 L. D. 395); overruled, 27 L. D. 464.
- Northern Pacific R. R. Co. *v.* Marshall et al. (17 L. D. 545); overruled, 28 L. D. 174.
- Northern Pacific R. R. Co. *v.* Miller (7 L. D. 100); overruled so far as in conflict, 16 L. D. 229.
- Northern Pacific R. R. Co. *v.* Sherwood (28 L. D. 126); overruled so far as in conflict, 29 L. D. 550.
- Northern Pacific R. R. Co. *v.* Symons (22 L. D. 686); overruled, 28 L. D. 95.
- Northern Pacific R. R. Co. *v.* Urquhart (8 L. D. 365); overruled, 28 L. D. 126.
- Northern Pacific R. R. Co. *v.* Walters et al. (13 L. D. 230); overruled so far as in conflict, 49 L. D. 391.
- Northern Pacific R. R. Co. *v.* Yantis (8 L. D. 58); overruled, 12 L. D. 127.
- Nunez, Roman C. and Serapio (56 I. D. 363); overruled so far as in conflict, 57 I. D. 213.
- Nyman *v.* St. Paul, Minneapolis, and Manitoba Ry. Co. (5 L. D. 396); overruled, 6 L. D. 750.
- O'Donnell, Thomas J. (28 L. D. 214); overruled, 35 L. D. 411.
- Olson *v.* Traver et al. (26 L. D. 350, 628); overruled so far as in conflict, 29 L. D. 480; 30 L. D. 382.
- Opinion A. A. G. (35 L. D. 277); vacated, 36 L. D. 342.
- Opinions of Solicitor, September 15, 1914, and February 2, 1915; overruled, September 9, 1919 (D. 43035, May Caramony). (See 58 I. D. 149, 154-156.)
- Opinion of Solicitor, October 31, 1917 (D-40462); overruled so far as inconsistent, 58 I. D. 85, 92, 96.
- Opinion of Solicitor, February 7, 1919 (D. 44083); overruled, November 4, 1921 (M. 6397). (See 58 I. D. 158, 160.)
- Opinion of Solicitor, August 8, 1933 (M. 27499); overruled so far as in conflict, 54 I. D. 402.
- Opinion of Solicitor, May 8, 1940 (57 I. D. 124); overruled in part, 58 I. D. 562, 567.
- Opinion of Acting Solicitor, July 30, 1942; overruled so far as in conflict, 58 I. D. 331. (See 59 I. D. 346, 350.)
- Opinion of Solicitor, August 31, 1943 (M. 33183); distinguished, 58 I. D. 726, 729.

- Oregon and California R. R. Co. *v.* Puckett (39 L. D. 169); modified, 53 I. D. 264.
- Oregon Central Military Wagon Road Co. *v.* Hart (17 L. D. 480); overruled, 18 L. D. 543.
- Owens et al. *v.* State of California (22 L. D. 369); overruled, 38 L. D. 253.
- Pacific Slope Lode (12 L. D. 686); overruled so far as in conflict, 25 L. D. 518.
- Papina *v.* Alderson (1 B. L. P. 91); modified, 5 L. D. 256.
- Patterson, Charles E. (3 L. D. 260); modified, 6 L. D. 284, 624.
- Paul Jones Lode (28 L. D. 120); modified, 31 L. D. 359.
- Paul *v.* Wiseman (21 L. D. 12); overruled, 27 L. D. 522.
- Pecos Irrigation and Improvement Co. (15 L. D. 470); overruled, 18 L. D. 168, 268.
- Pennock, Belle L. (42 L. D. 315); vacated, 43 L. D. 66.
- Perry *v.* Central Pacific R. R. Co. (39 L. D. 5); overruled so far as in conflict, 47 L. D. 304.
- Phebus, Clayton (48 L. D. 128); overruled so far as in conflict, 50 L. D. 281.
- Phelps, W. L. (8 C. L. O. 139); overruled, 2 L. D. 854.
- Phillips, Alonzo (2 L. D. 321); overruled, 15 L. D. 424.
- Phillips *v.* Breazeale's Heirs (19 L. D. 573); overruled, 39 L. D. 93.
- Pieper, Agnes C. (35 L. D. 459); overruled, 43 L. D. 374.
- Pierce, Lewis W. (18 L. D. 328); vacated, 53 I. D. 447; overruled so far as in conflict, 59 I. D. 416, 422.
- Pietkiewicz et al. *v.* Richmond (29 L. D. 195); overruled, 37 L. D. 145.
- Pike's Peak Lode (10 L. D. 200); overruled in part, 20 L. D. 204.
- Pike's Peak Lode (14 L. D. 47); overruled, 20 L. D. 204.
- Popple, James (12 L. D. 433); overruled, 13 L. D. 588.
- Powell, D. C. (6 L. D. 302); modified, 15 L. D. 477.
- Premo, George (9 L. D. 70). (See 39 L. D. 162, 225.)
- Prescott, Henrietta P. (46 L. D. 486); overruled, 51 L. D. 287.
- Pringle, Wesley (13 L. D. 519); overruled, 29 L. D. 599.
- Provensal, Victor H. (30 L. D. 616); overruled, 35 L. D. 399.
- Prue, Widow of Emanuel (6 L. D. 436); vacated, 33 L. D. 409.
- Pugh, F. M., et al. (14 L. D. 274); in effect vacated, 232 U. S. 452.
- Puyallup Allotments (20 L. D. 157); modified, 29 L. D. 628.
- Ramsey, George L., Heirs of Edwin C. Philbrick (A. 16060), August 6, 1931, unreported; recalled and vacated, 58 I. D. 272, 275, 290.
- Rancho Alisal (1 L. D. 173); overruled, 5 L. D. 320.
- Rankin, James D., et al. (7 L. D. 411); overruled, 35 L. D. 32.
- Rankin, John M. (20 L. D. 272); reversed, 21 L. D. 404.
- Rebel Lode (12 L. D. 683); overruled, 20 L. D. 204; 48 L. D. 523.
- \*Reed *v.* Buffington (7 L. D. 154); overruled, 8 L. D. 110. (See 9 L. D. 360.)
- Regione *v.* Rosseler (40 L. D. 93); vacated, 40 L. D. 420.
- Rialto No. 2 Placer Mining Claim (34 L. D. 44); overruled, 37 L. D. 250.
- Rico Town Site (1 L. D. 556); modified, 5 L. D. 256.
- Rio Verde Canal Co. (26 L. D. 381); vacated, 27 L. D. 421.
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NOTE.—The abbreviations used in this title refer to the following publications: "B. L. P." to Brainard's Legal Precedents in Land and Mining Cases, vols. 1 and 2; "C. L. L." to Copp's Public Land Laws, edition of 1875, 1 volume; edition of 1882, 2 volumes; edition of 1890, 2 volumes; "C. L. O." to Copp's Land Owner, vols. 1-18; "L. and R." to records of the former Division of Lands and Railroads; "L. D." to the Land Decisions of the Department of the Interior, vols. 1-52; "I. D." to Decisions of the Department of the Interior, beginning with vol. 53.—EDITOR.

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# DECISIONS OF THE DEPARTMENT OF THE INTERIOR

## STATUS OF ALLOTTED LANDS OF TRIBES ORGANIZED UNDER OKLAHOMA INDIAN WELFARE ACT

### Oklahoma Indian Welfare Act—Iowa, Sac and Fox, and Cheyenne and Arapaho Reservations—Rights-of-Way Over Allotted Lands.

Lands allotted to Indians of the Iowa, Sac and Fox, and Cheyenne and Arapaho Tribes are not reservation lands within the meaning of the acts of February 15, 1901 (31 Stat. 790; 43 U. S. C. sec. 959), and March 4, 1911 (36 Stat. 1253; 43 U. S. C. sec. 961), which authorize the Secretary to issue grants of rights-of-way over certain lands.

The organization of the Iowa, Sac and Fox, and Cheyenne and Arapaho Indians under the Oklahoma Indian Welfare Act did not affect the status of allotted lands within the boundaries of their former reservations which had been dissolved by agreements of cession duly ratified by the Congress.

M-33510

JANUARY 11, 1945.

TO ASSISTANT SECRETARY CHAPMAN.

At the request of the Commissioner of Indian Affairs, the Commissioner of the General Land Office has presented the question of whether his rejection of the applications of the Central Rural Electric Cooperative, the Cimarron Electric Cooperative, and the Kiwash Electric Cooperative, Inc., for rights-of-way for electric transmission lines over land allotted to Iowa, Sac and Fox, and Cheyenne and Arapaho Indians, should be reconsidered. These applications had been submitted on November 9, 1942, November 24, 1942, and January 6, 1943, respectively, pursuant to the provisions of the acts of February 15, 1901 (31 Stat. 790; 43 U. S. C. sec. 959), and March 4, 1911 (36 Stat. 1253; 43 U. S. C. sec. 961). They were held in abeyance pending disposition by the Supreme Court of the case of *United States v. Oklahoma Gas & Electric Co.*, 318 U. S. 206 (1943). After the Court had decided that the above-mentioned acts did not apply to allotments within the boundaries of the former Kickapoo Reservation in Oklahoma, the Commissioner of the General Land Office informed the applicants that their applications could not be granted because the lands involved were in the same category as the allotted lands of the Kickapoo Indians. The Commissioner's decisions on the

applications of the Central Rural Electric Cooperative and the Kiwash Electric Cooperative, Inc., were approved by the Department on May 12, 1943, and October 29, 1943, respectively. The decision on the application of the Cimarron Electric Cooperative was not presented for departmental review.

In 1890, agreements of cession were obtained from the Cheyenne and Arapaho, the Sac and Fox, and Iowa Tribes. These agreements were negotiated in pursuance of the then general policy of reducing Indian reservations and allotting lands in severalty to individual Indians. The agreements with the Sac and Fox and Iowa Tribes were ratified by the act of February 13, 1891 (26 Stat. 749), and the agreement with the Cheyenne and Arapaho Tribes was ratified by the act of March 3, 1891 (26 Stat. 989, 1022). Each of these agreements ceded to the United States specifically described tracts of land then in tribal ownership for a money consideration and allotments of land in severalty within the ceded areas to members of the tribes. The Cheyenne and Arapaho agreement reserved from allotment certain lands "now used or occupied for military, agency, school, school-farm, religious, or other public uses." But the reserved lands were not excluded from the cession. The Iowa agreement excluded from the cession and reserved to the tribe a 10-acre tract of land for religious, education, and burial purposes. The Sac and Fox excluded from the cession and reserved to the tribe a quarter section of land on which the Sac and Fox Agency was located, and a whole section of land then set apart for school and farm. With these exceptions the cessions made by these Indian tribes differed in no respect from the cession agreement interpreted by the Supreme Court in *United States v. Oklahoma Gas & Electric Co.*, *supra*, and in conformity with the decision in that case it must be held that the ceded lands, including the allotments subsequently made, ceased to be a "reservation," as that term is used in the acts of February 15, 1901, and March 4, 1911, *supra*.

No change in this situation has been wrought by subsequent legislation. In the case of the Iowa and Sac and Fox, neither executive nor legislative recognition of the existence of reservations subsequent to the cession has been found. In the case of the Cheyenne and Arapaho, the Congress has by sundry appropriation acts enacted during the years 1894 to 1923 made appropriations for the support of the Cheyenne and Arapaho "who have been collected on the reservations set apart for their use and occupation in Oklahoma."<sup>1</sup> In 1908,<sup>2</sup> Congress authorized the sale of a part of the school reserve "for

<sup>1</sup> See, e. g., acts of August 15, 1894 (28 Stat. 286, 302), and January 24, 1923 (42 Stat. 1174, 1195).

<sup>2</sup> Act of May 29, 1908 (35 Stat. 444, 447).

January 11, 1945

the benefit of the Indians of the Cheyenne and Arapahoe reservations," and in 1938<sup>3</sup> Congress set aside certain lands "for the use and benefit of the Indians of the Cheyenne and Arapahoe Reservation." These references to a "reservation" or "reservations" of the Cheyenne and Arapaho fall far short of restoring the allotted lands to a reservation status. None of them had that purpose in mind. With the sole exception of the act of April 13, 1938, which has no application to allotted lands and which could be regarded as giving reservation status only to the limited acreage described therein, none of the acts purported to restore the tribal title which had previously been conveyed to the United States. The terms "reservation" or "reservations" evidently were used not to indicate an understanding of the Congress that the dissolved reservation had been re-established but rather in a geographic sense "to describe a region of Oklahoma as of a time subsequent to the dissolution." See *United States v. Oklahoma Gas & Electric Co.*, *supra*. Any possible doubt about this conclusion would appear to be removed by the act of June 17, 1910 (36 Stat. 533), in which the Congress, with full knowledge concerning the status of the lands,<sup>4</sup> correctly referred to "what was formerly Cheyenne and Arapahoe Indian Reservation."

The Commissioner of Indian Affairs suggests that by organization under the Oklahoma Indian Welfare Act of June 26, 1936 (49 Stat. 1967; 25 U. S. C. secs. 501-509), these tribes acquired jurisdiction of the lands formerly included in their reservations, and that the approval of the tribal constitution should be regarded as recognition of the existence of the reestablished reservations. This suggestion is without merit. There is nothing in the Oklahoma Indian Welfare Act itself, or in its legislative history, to indicate an intent on the part of Congress to reestablish merely by organization thereunder any dissolved Indian reservation. Section 3, which deals with the organization of tribes, does not make any reference to reservations. Lands acquired under the act for the use and benefit of the tribe and held in trust by the United States may no doubt acquire a reservation status.<sup>5</sup>

This office has apparently taken the view in its memorandum of June 30, 1938 (before the decision in the *Oklahoma Gas & Electric Co.* case), that an allotment "in the Cheyenne and Arapaho reservation" is part of a reservation within the meaning of the drainage ditch right-of-way act of March 3, 1891 (26 Stat. 1095, 1101). The memorandum assumes the continued existence of the reservation with-

<sup>3</sup> Act of April 13, 1938 (52 Stat. 213).

<sup>4</sup> See H. Rept. No. 704, 62d Cong., 2d sess. (1912).

<sup>5</sup> Solicitor's opinions, August 24, 1942, 58 I. D. 85, and M. 33246, September 16, 1943.

out discussing that point, and deals solely with the question of whether an allotment can be considered to be a part thereof. There is no doubt that an Indian reservation may include individual allotments. However, there must be a recognized reservation with definite boundaries within which the allotment is located before this principle can be applied. *United States v. Sutton*, 215 U. S. 291 (1909).

The situation discussed in our opinion of September 16, 1943 (M. 33246), concerning the reservation of the Siletz Indians of Oregon covers a somewhat different fact situation. There the reservation continued to exist in spite of the allotments, and we found a continuation of the general body and boundaries of the reservation.

Practically, the result of a determination that these allotted lands are not within the scope of the acts of February 15, 1901, and March 4, 1911, is simply that it will be necessary for the companies to obtain from each allottee, subject to approval of the Department, a permit or an easement deed covering the segment of the right-of-way across his or her individual allotment. The files indicate that statements of consent have already been obtained from most of the individuals concerned.

While it is my conclusion that the prior decisions in this matter are correct and that they should not be disturbed, I express no opinion on the question whether the lands involved could properly be considered as reservation lands for purposes other than the application of the acts of February 15, 1901, and March 4, 1911, *supra*.

FOWLER HARPER,  
*Solicitor.*

Approved:

OSCAR L. CHAPMAN,  
*Assistant Secretary.*

## ACREAGE CHARGES AGAINST HOLDERS OF OPERATING AGREEMENTS WITH OIL AND GAS LESSEES

### Mineral Leasing Act—Statutory Construction—Oil and Gas Leases— Operating Agreements with Lessees—Acreage Charges Prior to Discovery.

The purpose of section 27 of the Mineral Leasing Act (act of February 25, 1920, 41 Stat. 437, 448, as amended; 30 U. S. C. sec. 184) is to prevent monopolistic control over the oil and gas deposits in the public domain.

Even prior to discovery, a holder of operating agreements with lessees of non-competitive oil and gas leases is chargeable with the acreage subject to the agreements and, under section 27 of the Mineral Leasing Act, may not hold at one time agreements with lessees covering in the aggregate more than 7,680 acres in any one State, or 2,560 acres within the geologic structure of the

January 12, 1945

same producing oil or gas field. The rule as to a holder of operating agreements with permittees (52 L. D. 359) *distinguished*.

The Department is prohibited, by section 27 of the Mineral Leasing Act, from promulgating a regulation permitting unlimited acreage holdings prior to discovery by an operator who has operating agreements with lessees of non-competitive oil and gas leases.

M-33846

JANUARY 12, 1945.

TO ASSISTANT SECRETARY CHAPMAN.

In your memorandum of October 13, 1944, you requested an opinion as to the legal validity of an amendment to the regulations, proposed by a Technical Subcommittee on the Revision of Oil and Gas Regulations, which would permit unlimited acreage holdings prior to discovery by an operator who has operating agreements with lessees of noncompetitive oil and gas leases.

Section 27 of the Mineral Leasing Act (act of February 25, 1920, 41 Stat. 437, 448, as amended; 30 U. S. C. sec. 184), provides:

\* \* \* no person, association, or corporation shall take or hold at one time oil or gas leases or permits exceeding in the aggregate seven thousand six hundred and eighty acres \* \* \* in any one State, and not more than two thousand five hundred and sixty acres within the geologic structure of the same producing oil or gas field; \* \* \* if any of the lands or deposits leased \* \* \* shall be \* \* \* controlled by any device \* \* \* in any manner whatsoever, so that they \* \* \* form the subject \* \* \* of any holding of such lands by any individual, partnership, association, corporation, or control in excess of the amounts of lands provided in this Act, the lease thereof shall be forfeited by appropriate court proceedings \* \* \*.

In 1928, the Department held that acreage in *prospecting permits* covered by operating contracts would not be charged against the operator (52 L. D. 359, 361). Ten years later, after careful consideration of the problem, a different rule was adopted with respect to holders of operating contracts with *lessees*.<sup>1</sup> The Department ruled that, even prior to discovery, a holder of an operating contract carrying with it a right to a part of the production from the lands included in an oil and gas lease had an interest in the lease and was chargeable with acreage in the proportion that the interest under the contract bore to the total acreage of the lease (letter to LeRoy H. Hines, dated April 19, 1938, 1708342 "L" MB).

Basic differences in the nature of the estates under a lease and under a prospecting permit were held to justify the departure from the 1928 ruling. Thus, it was pointed out that, whereas a permit granted an

<sup>1</sup> The act of August 21, 1935 (49 Stat. 674, 676), prohibited the further issuance of oil and gas prospecting permits except on applications filed 90 days or more before the effective date of the act, and provided, instead, for the issuance of noncompetitive leases on lands not within a known producing structure for a period of 5 years and so long thereafter as oil or gas was produced in paying quantities.

exclusive right for the purpose of prospecting the land for 2 years and for no other purpose, a lease granted the right not only to prospect for 5 years but also, in the event of discovery, to remove and dispose of the oil and gas deposits after the 5-year period so long as such oil or gas was produced in paying quantities, subject only to cancellation by appropriate court proceedings for default in the lease obligations. Accordingly, despite some similarity, prior to discovery, in the characteristics of a lease and a prospecting permit—such as their both being subject to cancellation for cause—it was concluded that leases were, in effect, of a more permanent nature and vested the lessees with a property right and estate for years in real property. The rule adopted was said to be “consistent with the purpose and intent of the leasing law.”

The proposed amendment would overturn this ruling by according the same treatment to operators under leases before discovery as was accorded operators holding agreements involving prospecting permits. Under the amendment, operators holding agreements with lessees would not be charged with the acreage subject to the agreements until after discovery.

In my judgment, the Department's position in this matter should not be reversed. I believe that a contrary ruling would contravene the purpose and intent of section 27. Accordingly, I am of the opinion that the proposed amendment is unauthorized by law.

The manifest design of section 27, as amended, is to prevent monopolistic control over the oil and gas deposits in the public domain (56 I. D. 174 (1937); 52 L. D. 359, 361 (1928)). Thus, section 27 proscribes not only the taking or holding at one time of oil or gas leases or permits exceeding in the aggregate 7,680 acres in any one State and 2,560 acres within the geologic structure of the same producing oil or gas field by a permittee or lessee, but also the control by “any device permanently, temporarily, directly, indirectly, tacitly, or in any manner whatsoever” of “leased” “lands or deposits” so that the latter “form the subject \* \* \* of any holding of such lands \* \* \* or control in excess of” such acreage, or “form a part of or are in anywise controlled by any combination in the form of an unlawful trust, with consent of lessee, or form the subject of any contract or conspiracy in restraint of trade in the mining or selling of \* \* \* oil [or] \* \* \* gas \* \* \* entered into by the lessee, or any agreement or understanding \* \* \* to which such lessee shall be a party, of which his or its output is to be \* \* \* the subject, to control the price or prices thereof \* \* \*.” It also prohibits any person, association, or corporation from taking or holding at one time any interest as a member of an association or as a stockholder of a corporation holding leases or permits which, together



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with the area embraced in any direct holding of leases or permits, or which, together with any other interest as a member of an association or as a stockholder in a corporation holding leases or permits, exceeds in the aggregate the maximum number of acres allowed to any one lessee or permittee. And any lease or other interest held in violation of these provisions "shall be forfeited to the United States by appropriate" court "proceedings." The Secretary of the Interior is charged with the duty of guarding against and preventing such monopoly (secs. 27, 30, 32, act of February 25, 1920, 41 Stat. 448-450, as amended; 30 U. S. C. secs. 184, 187, 189). Thus, the Secretary is expressly required to see that leases contain "such \* \* \* provisions as he may deem necessary \* \* \* for the prevention of monopoly." (Sec. 30, *supra*.)

The Department's ruling, as it now stands, furthers the congressional policy of precluding such control of public oil and gas lands as might lead to the dangers inherent in monopoly. One of the usual concomitants of monopoly of public lands is the holding or control of large areas of such lands without development where the interests of those in control would be furthered thereby. The longer the period of possible control the greater the likelihood that this monopolistic evil will be spawned. It is not inconceivable, therefore, that the 5-year period of a lease would lend itself more readily to monopolistic control of public lands than the 2-year period of a permit. Moreover, leased lands are not subject to the safeguard against nondevelopment—the legal compulsion to drill—which was applicable to lands under a permit and, accordingly, are more susceptible to control without development. Thus, a permit could be issued only upon condition that the permittee begin drilling within 6 months and drill to specified depths within 1 and 2 years (section 13, act of February 25, 1920, as amended), while neither the statute nor the regulations require the drilling of lands subject to a lease, except under certain conditions not here material. It is true that the lease contains a provision which requires the lessee to drill when the Secretary of the Interior so orders. But it is doubtful that the existence of the power to compel drilling will, as a practical matter, serve as an effective check on the nondevelopment of leased lands. Apparently, because of administrative difficulties, it has not been availed of in the past, and there is no reason to believe that it will be exercised to any greater extent or with any greater efficacy in the immediate future. Finally, the danger of a tie-up of lands and production for an unreasonable period where the lands are subject to leases is aggravated by the provisions of the act of July 29, 1942 (56 Stat. 726; 30 U. S. C. sec. 226b), which grant a preference right to a new lease to a holder of a noncompetitive 5-year lease where the lands subject to the lease are not within a known

producing structure on the expiration date of the lease. To adopt a construction, in the absence of a clear congressional mandate, which would permit one operator thus to control and, for practical purposes, if he chose, to stifle development and production on areas of public land in excess of the acreage limitations prescribed by Congress for an indefinite period, would plainly be inconsistent with the evident intent of section 27 of the act.

When Congress has intended to permit exceptions from the acreage-charge provisions of section 27, it has not been loath to make that intention plain. Thus, in 1935, Congress expressly excepted leases operated under a cooperative or unit plan approved or prescribed by the Secretary of the Interior "in determining holdings or control under the provisions of" any section of the leasing law (act of August 21, 1935, 49 Stat. 674, 676; 30 U. S. C. sec. 226). Again, the acreage limitations of section 27 are expressly made inapplicable to interests acquired by descent, will, judgment, or decree for a period of 2 years after acquisition (section 27, act of February 25, 1920, 41 Stat. 448, as amended), to leases issued in exchange for permits without proof of discovery until 1 year after discovery (section 13, act of February 25, 1920, *supra*, as amended by the act of August 21, 1935, 49 Stat. 674), to new leases issued under the 1935 act in exchange for old leases except to the extent that such limitation of acreage was provided for by law when the old lease was issued (section 2 (a), act of August 21, 1935, 49 Stat. 679; 30 U. S. C. sec. 223a), and to permits and leases issued to certain claimants of rights in oil or gas lands acquired prior to 1920 (sections 27, 18, 19, 22, act of February 25, 1920, *supra*, as amended; 30 U. S. C. secs. 184, 227, 228, 251). And the Secretary has been authorized "to approve operating, drilling or development contracts made by one or more permittees or lessees in oil or gas leases or permits, with one or more persons, \* \* \* whenever in his discretion *and regardless of acreage limitations* \* \* \* conservation of natural products or the public convenience or necessity may require it or the interests of the United States may be best subserved thereby: \* \* \*." (Act of March 4, 1931, 46 Stat. 1523; 30 U. S. C. sec. 184; italics supplied.) In a proper case involving operating contracts made with lessees prior to discovery, the Secretary might conceivably be warranted in exercising his authority under this section if he found that the statutory conditions exist. But, since the danger of monopolistic control is always present in such a case, the adoption of a *general rule* such as that proposed, which would approve operating contracts made with lessees regardless of acreage limitations prior to discovery, could hardly be justified as being required for the conservation of oil and gas or for the public

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convenience or necessity, or as "best" subserving the interests of the United States.

Proponents of the proposed amendment to the regulations contend that the distinction made in the *LeRoy H. Hines* case between the nature of the estate under a prospecting permit and under a lease is untenable, and that, accordingly, the conclusion reached in that case is unjustified.

The argument is made that there is no practical difference between a permit and a lease so far as acreage charges are concerned, because both a permittee and a lessee are charged with acreage under the statute. But that argument loses sight of the fact that "control" of lands subject to a permit or lease—the standard applicable to the instant situation—may be something different from the holding of a permit or a lease of lands. What constitutes control of lands subject to a permit or lease is a factual question the resolution of which might well depend upon fundamental factual differences between the nature of the estates granted a permittee and a lessee, regardless of the fact that, by statute, permittees are subject to acreage charges to the same extent as lessees. Such differences are elsewhere considered.

It is also claimed that the proper test as to whether or not an operator is chargeable with acreage is not the nature of the estate under a lease, but rather the nature of the estate under a lease *prior to discovery*. Prior to discovery, it is said, a lessee or an operator under a lease, like a permittee or an operator under a permit, has an estate which is "inchoate and for the purpose of exploration only," and thus holds nothing which is properly chargeable under section 27. Moreover, it is said, prior to discovery, a lease, like a permit, is subject to cancellation by the Department. This similarity in characteristics, it is argued, warrants the adoption of a rule which would treat an operator under a lease prior to discovery the same as an operator under a permit so far as exemption from acreage charges is concerned.

But the history of the legislation with respect to exemptions from the acreage-charge provisions of section 27 points the other way. As already indicated, in 1935, a fundamental change was made in the leasing act of 1920 by providing generally for the issuance of 5-year noncompetitive leases instead of prospecting permits on lands not within a known producing structure (act of August 21, 1935, 49 Stat. 674, 676; 30 U. S. C. sec. 226). Section 27, as amended in 1931, prohibited the control by any device of any "leased" lands or deposits in excess of 7,680 acres in any one State and 2,560 acres within the same producing oil or gas field. Inasmuch as only permits, not leases, could be issued before discovery on lands outside of a known producing structure prior to the 1935 amendment, manifestly, originally,

this prohibition of section 27 was not directed against control of lands outside of a known producing structure prior to discovery. The Department so held in effect when it ruled that the prohibition against control in section 27 was applicable only to leases, and not to permits, and therefore that an operating agreement with a permittee was not subject to the acreage limitations prescribed thereby (52 L. D. 359). When Congress substituted the lease system for the permit system, it was not unmindful of the acreage-charge provisions of section 27 or their applicability to leases prior to discovery. Thus, it expressly excepted from that section leases issued in exchange for permits without proof of discovery until 1 year after discovery (section 13), apparently in recognition of the fact that, in the absence of such a provision, persons holding operating agreements under the permits which were exchanged for such leases would be chargeable with acreage prior to discovery. It also excepted leases operated under a cooperative or unit plan approved or prescribed by the Secretary of the Interior (section 17). The only other exception which was made in the 1935 act related to leases issued in exchange for leases obtained prior to the act (section 2 (a)). And, although it had substituted leases for permits and the Department had previously pointed out that the control provisions of section 27 were applicable only to *leased* lands, Congress did not see fit further to limit those provisions by making them applicable to leased lands outside of a known producing structure only after discovery. The evidence is, therefore, persuasive that Congress intended that, except as otherwise specifically provided, the same treatment be accorded lands subject to lease both before and after discovery for the purpose of determining acreage interest charges.

Moreover, a comparison of the interest under a lease prior to discovery with that under a permit fails to take into account inherent differences in the degree of control, both actual and potential, to which lands under a lease and those embraced by a permit are subject. Thus, a permittee had only the right to prospect for oil and gas, and, in the event of discovery, the right merely to *acquire* a lease for one-fourth of the land embraced in the permit and a preference right to a lease for the remainder of the land for 20 years, with no assurance of tenure thereafter on the same terms.<sup>2</sup> (Sec. 14, act of February 25, 1920, 41 Stat 442, as amended; 30 U. S. C. secs. 223, 226.) On the other hand, a holder of a noncompetitive lease has an immediate leasehold interest in all of the lands subject to the lease for 5 years

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<sup>2</sup> See report of the Department on S. 1772, 79 Cong. Rec. 12077, 74th Cong., 1st sess. Such lessees had merely a preference right to renewal of the lease for successive periods of 10 years *on such terms and conditions* as the Secretary of the Interior might prescribe. (Secs. 14, 17, act of February 25, 1920, 41 Stat. 442, 443, as amended; 30 U. S. C. secs. 223, 226.)

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and a preference right to a new lease thereof prior to discovery and the right, without more, immediately upon discovery, to produce and sell any oil or gas produced. (Sec. 17, act of February 25, 1920, 41 Stat. 443, as amended by act of August 21, 1935, 49 Stat. 676, and act of July 29, 1942, 56 Stat. 726; 30 U. S. C. sec. 226, 226b.)

But even if it be assumed that the suggested comparison is appropriate, the short answer to the proponents' argument for similar treatment is, as has been seen, the greater likelihood of monopolistic control even prior to discovery when an operator is subject to a 5-year lease than when he operates under a 2-year permit. Acreage charges would, therefore, be warranted in the one case although it might not be in the other.

In an opinion of the Department (*Bert O. Peterson et al.*, 58 I. D. 661), cited by proponents, it was stated that the "approval of the operating agreement indicated merely that the Secretary recognized the operator as a qualified driller who might, after discovery, acquire an interest in the lease \* \* \*." But the quoted language is not authority for adopting the same rule as to acreage charges for both operators under a lease and those subject to a permit. For, in the *Peterson* case, the Department held merely that an operator did not possess a sufficient interest in the lease to be deemed a "lease owner" within the meaning of a statute which required notice of a proposed cancellation of a lease prior to discovery to be sent to the "lease owner." At best, the case stands for the proposition that the interests of an operator in a permit and in a lease prior to discovery are sufficiently similar to subject them both to the same cancellation procedures. It does not follow, however, that the extent of possible control of public lands under both such interests is the same or similar and that therefore like treatment should be accorded them under a statutory provision designed to prevent monopoly of such lands by limiting acreage control. Difference in treatment of the same or similar legal interests or relationships for different purposes is not unknown in the law. Cf. 1 Summers, Oil and Gas, pp. 371, 510-511, 514; *Helvering v. Hallock*, 309 U. S. 106, 117, 118 (1940); *International Harvester Co. v. Wisconsin Department of Taxation*, 322 U. S. 435, 441 (1944).

The stated purpose of the proposed amendment is to encourage exploration for oil in areas where the location of a geologic trap cannot be circumscribed with reasonable certainty by exempting operators having agreements with lessees from acreage charges. Many operators apparently hesitate to incur the high drilling costs involved in exploration unless they are permitted to control sufficient acreage to give full coverage to their structural assumptions and to give reasonable assurance that, if discovery is made, the total production will be

of sufficient volume to yield a reasonable profit. But, admittedly, the same result may be achieved, in accordance with express congressional authority, by the utilization of a cooperative or unit plan. That this congressionally prescribed road to exemption from acreage charges may lead to undisclosed agreements with lessees, or may be so time-consuming and costly as to be unattractive to lessees, is no justification for the Department's providing a route which would necessitate a departure from statutory policy.

FOWLER HARPER,  
*Solicitor.*

Approved:

OSCAR L. CHAPMAN,  
*Assistant Secretary.*

### INVENTION OF A COMPACT BOOK OF DURABLE STANDARDIZED COLORS

**Order No. 1763—Duties of Inventor—Development of Invention—Act of March 3, 1883, as Amended.**

The invention of improved color standards by an employee of the Interior Department engaged in potash research who uses such standards incidentally in his work is not so related to his assigned duties of research as to require its assignment to the Government under Departmental Order No. 1763 of November 17, 1942.

The use of Government items of insignificant value by an inventor in the development of his invention is not such a substantial development of the invention with Government facilities or financing as to require the assignment of the invention to the Government under Order No. 1763.

The Government will acquire shop rights in an invention not subject to Order No. 1763 upon a certification that it is liable to be used in the public interest, if the inventor obtains a patent under the act of March 3, 1883, as amended (35 U. S. C. sec. 45).

M-33923

JANUARY 18, 1945.

THE SECRETARY OF THE INTERIOR.

MY DEAR MR. SECRETARY: Pursuant to Departmental Order No. 1871 of September 7, 1943, my opinion has been requested concerning the relative rights of the Government and Walter B. Lang, an employee of the Geological Survey, under Departmental Order No. 1763 of November 17, 1942, to an invention made by Mr. Lang.

The invention consists of a Compact Book of Durable Standardized Colors the purpose of which is to provide in convenient and inexpensive form a maximum number of individual colors so arranged that each color may be laid directly in contact with the object to be com-

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pared or tested. In his capacity as a geologist performing difficult and responsible work and conducting research in the field of potash, Mr. Lang has occasion to use color standards. His use of these standards is the same sort of use that he might make of a slide rule, a ruler, or other instrument of measurement. They are tools common to many professions, without unique application to the field of potash, or even to geology.

The mere fact that Mr. Lang uses them in the course of his work does not make them, or their improvement, any more a part of his work than the invention of a new type of mechanical pencil is the work of an attorney engaged in legal research. Accordingly, even though the perception of the need for an improvement in color standards may have arisen contemporaneously with his work of research, it cannot be said that the invention arose in the course of his assigned duties of research, or that it was relevant to the general field of an assigned inquiry. The invention, therefore, is not required to be assigned to the Government under Order No. 1763 because of its relation to his duties of research or investigation.

Nor do the circumstances surrounding the development of the invention indicate such a substantial development on Government time, through the use of Government facilities, or with the aid of Government information not available to the public, as to require its assignment to the Government upon that ground. Mr. Lang's uncontradicted invention report shows that the invention was developed on the inventor's own time, without the aid of special Government information. The only Government facilities used were his office space, after working hours, and pencils, paper, and color tabs. These items are so insignificant in value that it cannot be said that the invention was substantially made or developed through the use of Government facilities or financing.

Since the invention is not required to be assigned to the Government upon either of the grounds specified in Order No. 1763, the Government has no absolute right therein. However, it will be entitled to the right to the manufacture and use of the invention by and for the Government for governmental purposes without the payment of any royalty if Mr. Lang obtains a patent, as he has indicated his intention to do, under the act of March 3, 1883, as amended (35 U. S. C. sec. 45). He has made a sufficient showing that the invention is liable to be used in the public interest for the necessary certificate to be signed.

FELIX S. COHEN,  
*Acting Solicitor.*

Approved:

MICHAEL W. STRAUS,  
*Assistant Secretary.*

## AUTHORITY OF GOVERNOR OF ALASKA TO GRANT REPRIEVES AND PARDONS

**Governor of Alaska—The President—Territorial Government—Reprieves  
and Pardons—Statutory Construction.**

The Governor of Alaska has power under the act of June 6, 1900 (31 Stat. 321; 48 U. S. C. secs. 61, 64), to grant reprieves for persons convicted of Territorial or Federal offenses, but his power is limited in either event to such time as the decision of the President is made known.

The Governor of Alaska has no power to grant pardons.

**M-33940**

JANUARY 24, 1945.

**TO THE DIRECTOR, DIVISION OF TERRITORIES AND ISLAND POSSESSIONS.**

By a memorandum dated January 1, you forwarded to me a letter dated December 28, 1944, addressed to you by the Governor of Alaska, requesting an opinion with respect to the powers of the Governor to grant (a) reprieves for persons convicted of Territorial offenses, (b) pardons for persons convicted of Territorial offenses, and (c) reprieves for persons convicted of Federal offenses until the decision of the President is made known.

It is my opinion that the Governor of Alaska has power to grant reprieves for persons convicted of Territorial or Federal offenses, but that his power in either event is limited to such time as the decision of the President is made known. It is also my opinion that the Governor of Alaska has no power to grant pardons.

This subject is discussed at length in an opinion dated May 22, 1934, addressed to the Secretary of the Interior by the Attorney General (37 Op. Atty. Gen. 528). In that opinion \* \* \* the Attorney General calls attention to the fact that the applicable statute is the act of June 6, 1900 (31 Stat. 321; 48 U. S. C. secs. 61, 64), rather than section 1841 of the Revised Statutes (48 U. S. C. sec. 1453), and comes to the conclusions indicated above.

FELIX S. COHEN,  
*Acting Solicitor.*

## STATE OF ARIZONA

**A-23930**

*Decided February 13, 1945*

**Waters and Water Rights.**

Sections 2339, 2340, Revised Statutes (30 U. S. C. secs. 51, 52), recognize the right of prior appropriation of water on the public domain even as against the United States and its grantees where the appropriation is authorized by the State in which it is made.

The rights to water recognized and safeguarded under section 2339, Revised Statutes, are distinct from the rights to the land itself.



*February 13, 1945*

Under section 2340, Revised Statutes, subsequent disposal or withdrawal of lands containing waters the rights to which have vested or accrued is subject to an easement sufficient to permit the continued use of the waters.

#### **Waters and Water Rights—Withdrawals.**

No purpose of the Executive order of April 17, 1926, would be served by the withdrawal of a subdivision of public land containing a spring, although of the character contemplated by the withdrawal, if the right to use the waters is vested under State law in private parties.

#### **State School Land—Indemnity.**

The existence of rights under the provisions of section 2339, Revised Statutes, should be no bar to the perfection of a State school indemnity selection, the clear list issued thereupon being under section 2340, Revised Statutes (30 U. S. C. sec. 52), subject to vested and accrued water rights recognized under section 2339, Revised Statutes.

#### **APPEAL FROM THE GENERAL LAND OFFICE**

By decision of November 2, 1940, the Commissioner of the General Land Office held for cancellation indemnity school-land selection, Phoenix 074398, filed April 2, 1934, for sec. 23, T. 5 S., R. 14 E., G. & S. R. M., to the extent of the SE $\frac{1}{4}$  thereof, for the reason that said tract is included in Public Water Reserve No. 107 by Interpretation No. 262, approved October 2, 1940.

Theretofores, a special agent of the General Land Office had reported that on said tract there is a developed spring known as the D3 spring, near the center thereof, which had been developed and improved by J. J. Anderson, who had a State water filing thereon; that at the time of examination in February 1937 the spring had a flow of about 3,000 gallons per day. By letter of June 2, 1938, the register was directed to call upon the State to furnish evidence as to date of the filing of the application to the State, the date of the issuance of the water right, and to describe the legal subdivision or subdivisions on which the spring is located for the purpose of determining whether or not said spring is of the character intended to be withdrawn by Executive order of April 17, 1926, creating Public Water Reserve No. 107.

In response to the call, the State filed a certificate of the State Water Commissioner dated June 30, 1938, as follows:

THIS IS TO CERTIFY THAT the records of my office show that on July 19, 1938 [sic], J. J. Anderson, of Hayden, Arizona, filed Application No. A-847 for permit to appropriate waters of D3 Draw at a point known as Finch Spring, the water to be diverted by means of a concrete dam 8 feet high and 4 feet long and pipe line about 150 feet long into a cement trough for stock-watering use. The dam is described as being located in the SE $\frac{1}{4}$ NE $\frac{1}{4}$ NE $\frac{1}{4}$  of sec. 23, T. 5 S., R. 14 E., G. & S. R. B. & M., Pinal County, Arizona. Permit was granted on July 21, 1928, and Certificate of Water Right No. 229 was issued on October 2, 1928.

Thereafter, the interpretative order was issued, presumably in the view that the date of application of Anderson for a water permit, or the date of the grant thereof, marked the date of the appropriation of the water, and these dates being later than the date of Executive Order No. 107, the order barred such appropriation.

The State appealed from the rejection and as grounds therefor stated:

That the waters attempted to be included in said Public Water Reserve are waters which were located and developed in 1917 and 1918, and which have been continuously put to a beneficial use since that time by the original appropriators, and his or their successors in interest; that said improvements consist of a concrete curb well, pipe line, and concrete trough; that said development of water and improvements thereon were placed upon said land long prior to the enactment of the Public Water Reserve Act of 1926, and therefore under the terms of said Act and the proclamation thereunder by the President of the United States said Public Water Reserve No. 107 by Interpretation No. 262, approved October 2, 1940, is void and of no force and effect whatsoever, and is an attempt to deprive the owners of said water and improvements of property without due process of law.

Furthermore, said water being developed water, does not come within the provisions of said Act of 1926 relating to public water reserves or the proclamation made thereunder according to the rules, regulations, and decisions of the Department of the Interior.

The appeal is supported by the affidavits of three persons, to the effect that the D3 or Finch Spring on the SE $\frac{1}{4}$  sec. 23, T. 5 S., R. 14 E., was improved with a curbed well, pipe line, and concrete trough in 1917 or 1918 by J. L. Neal and these improvements were purchased by Anderson in 1920, and that the waters of the spring became available to water livestock by said improvements.

The field examiner's report confirms the statements in the appeal as to the character and extent of the improvements and their present use for stock watering, and the report of the regional grazier supports the allegations as to ownership by Anderson and continued beneficial use of the water for livestock watering since 1917 or 1918.

Upon the facts presented, the question emerges as to the propriety of interpreting Order No. 107 as reserving the land in question. The order reads:

Under and pursuant to the provisions of the act of Congress approved June 25, 1910 (36 Stat. 847), entitled "An act to authorize the President of the United States to make withdrawals of public lands in certain cases," as amended by act of Congress approved August 24, 1912 (37 Stat. 497), it is hereby ordered that every smallest legal subdivision of the public land surveys which is vacant unappropriated unreserved public land and contains a spring or water hole, and all land within one-quarter of a mile of every spring or water hole located on unsurveyed public land be, and the same is hereby, withdrawn from settlement, location, sale, or entry, and reserved for public use in accordance with the provisions of Sec. 10 of the act of December 29, 1916 (39 Stat. 862), and in aid of pending legislation.

February 13, 1945

The applicable part of section 10 of the act of December 29, 1916 (39 Stat. 862; 43 U. S. C. sec. 300), provides:

That lands containing water holes or other bodies of water needed or used by the public for watering purposes shall not be designated under this Act but may be reserved under the provisions of the Act of June twenty-fifth, nineteen hundred and ten, and such lands heretofore or hereafter reserved shall, while so reserved, be kept and held open to the public use for such purposes under such general rules and regulations as the Secretary of the Interior may prescribe: \* \* \*.

The Executive order of April 17, 1926, was designed to preserve for public use and benefit unreserved public lands containing water holes or other bodies of water needed or used by the public for watering purposes. (Circ. 1066; 43 Code of Federal Regulations 292.2.)

Vested water rights have been recognized by statute since long before 1917 or 1918. Section 2339, Revised Statutes (30 U. S. C. sec. 51), provides, in part, as follows:

Whenever, by priority of possession, rights to the use of water for mining, agricultural, manufacturing, or other purposes, have vested and accrued, and the same are recognized and acknowledged by the local customs, laws, and the decisions of courts, the possessors and owners of such vested rights shall be maintained and protected in the same; \* \* \*.

And section 2340, Revised Statutes, as amended (30 U. S. C. sec. 52), provides that—

All patents granted, or pre-emption or homesteads allowed, shall be subject to any vested and accrued water rights, \* \* \* as may have been acquired under or recognized by the preceding section.

Sections 2339 and 2340 are "not limited to rights acquired before 1866. They reach into the future as well, and approve and confirm the policy of appropriation for a beneficial use, as recognized by local rules and customs, and the legislation and judicial decisions of the arid-land states, as the test and measure of private rights in and to the non-navigable waters on the public domain." *California Oregon Power Co. v. Beaver Portland Cement Co.*, 295 U. S. 142, 155 (1935). (See, also, opinion of the Acting Solicitor, July 16, 1942, 58 I. D. 29.) They recognize the right of prior appropriation of water on the public domain even as against the United States and its grantees where the appropriation is authorized by the State in which it is made. *California Oregon Power Co. v. Beaver Portland Cement Co.*, *supra*; *Howell v. Johnson*, 89 Fed. 556 (C. C. Mont., 1898).

Under the state of law as it existed in Arizona prior to 1919, it appears that an appropriation of public waters of the State could be made by the mere application of such waters to a beneficial use, apparently without the posting or recording of any notice or any other formality. *Parker v. McIntyre*, 47 Ariz. 484, 56 P. (2d) 1337, 1339

(1936); cf. *Stewart v. Verde River Irrigation & Power Dist.*, 49 Ariz. 531, 68 P. (2d) 329, 332 (1937). The right to such waters becomes vested at the time of such application and is not affected by subsequent legislation relating to appropriation of public waters. (Sec. 56, ch. 164, Session Laws of Arizona, 1919; sec. 75-138, Arizona Code Anno., 1939.)

In view of the foregoing and the facts represented by the State of Arizona with respect to the appropriation in 1917-1918 of the water of the spring for stock watering by Anderson's predecessors in interest, there is every reason to believe that the waters of the spring had been validly appropriated under the law of the State on April 17, 1926, the date of Order No. 107, and the appropriation has been continuously maintained.

No purpose of the order would be served by a withdrawal of a subdivision of public land containing a spring, although of the character contemplated by the withdrawal, if the right to use of its waters is vested under State law in private parties. The interpretative order of 1940 was, therefore, erroneous. As the practice of issuing interpretative orders has been abolished, and the function of determining what lands fall within the purview of Order No. 107 has been transferred from the Grazing Service to the Commissioner of the General Land Office (memorandum of First Assistant Secretary, dated March 29, 1941), he should revoke the interpretative Order No. 262. The withdrawal being out of the way, the existence of private rights to the water on the land constitutes no legal obstacle to the approval of the selection. The rights to water recognized and safeguarded under section 2339, Revised Statutes, are distinct from the rights to the land itself. *Simons v. Inyo Cerro Gordo Mining & Power Co. et al.*, 192 Pac. 144 (1920); *California Oregon Power Co. v. Beaver Portland Cement Co.*, *supra*, 162; *Robert J. Edwards and J. C. Jamieson v. Oscar T. S. Sawyer*, 54 I. D. 144, 148 (1933); *Lee J. Esplin et al.*, 56 I. D. 325 (1938). Under section 2340, Revised Statutes, subsequent disposal or withdrawal of lands containing waters the rights to which have vested or accrued is subject to an easement sufficient to permit the continued use of the water. *A. T. West and Sons*, 56 I. D. 387 (1938). The existence of rights under the provisions of section 2339, *supra*, has been held to be no bar to the acquisition of the land under the Timber and Stone Act (*John H. Parker*, 40 L. D. 431 (1912)), or under the stock-raising homestead law (*Thomas H. B. Glaspie*, 53 I. D. 577 (1932)), and no reason is perceived why such rights should be a bar to the perfection of a State school indemnity selection, the clear list issued thereupon being under section 2340, Revised Statutes (30 U. S. C. sec. 52), subject to vested and accrued water rights recognized under section 2339, Revised Statutes.

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Accordingly, the decision of the Commissioner is reversed and the case remanded for further proceedings and adjudication in harmony with these views.

OSCAR L. CHAPMAN,  
*Assistant Secretary.*

## ACREAGE LIMITATION ON GRAZING DISTRICTS UNDER TAYLOR GRAZING ACT

### Taylor Grazing Act—"Vacant, Unappropriated, and Unreserved Lands"— Statutory Construction.

The term "vacant, unappropriated, and unreserved lands from any part of the public domain of the United States," as employed in the acreage-limitation provision in section 1 of the Taylor Grazing Act, does not include "lands withdrawn or reserved for any other purpose," to which reference is made in the proviso, and the acreage of the latter category of lands, when included in grazing districts "with the approval of the head of the department having jurisdiction thereof," is not to be included in computing the aggregate acreage of "vacant, unappropriated, and unreserved lands" permissible for inclusion in grazing districts.

### Taylor Grazing Act—"Vacant, Unappropriated, and Unreserved Lands"— Time of Determination of Acreage Limitation.

There may not at any particular point of time be more than 142 million acres of "vacant, unappropriated, and unreserved" lands in grazing districts.

### Taylor Grazing Act—Contemporaneous Administrative Construction— Legislative Ratification.

The repeated appropriation of a portion of the receipts from grazing fees collected for the use of all Federal range, with knowledge on the part of the Congress, through annual reports of the Secretary of the Interior, of the administrative construction consistently being placed on a statutory provision limiting the acreage of such range, is significant as a confirmation and ratification of that construction.

M-33913

FEBRUARY 19, 1945.

### THE SECRETARY OF THE INTERIOR.

MY DEAR MR. SECRETARY: Pursuant to a joint request by the Commissioner of the General Land Office and the Director of Grazing, the following questions arising under the Taylor Grazing Act<sup>1</sup> have been submitted to me for opinion:

1. What constitutes "vacant, unappropriated, and unreserved lands from any part of the public domain of the United States" required to be charged to the 142-million-acre limitation?

<sup>1</sup> Act of June 28, 1934 (48 Stat. 1269; 43 U. S. C. sec. 315 *et seq.*), as amended June 26, 1936 (49 Stat. 1976).

2. As of what date must the determination be made that land is "vacant, unappropriated, and unreserved" within the meaning of the statutory limitation?

# I

The first question arises under section 1 of the act, which provides in part:

That in order to promote the highest use of the public lands pending its final disposal, the Secretary of the Interior is authorized, in his discretion, by order to establish grazing districts or additions thereto and/or to modify the boundaries thereof, *not exceeding in the aggregate an area of one hundred and forty-two million acres of vacant, unappropriated, and unreserved lands from any part of the public domain* of the United States (exclusive of Alaska), which are not in national forests, national parks and monuments, Indian reservations, revested Oregon and California Railroad grant lands, or revested Coos Bay Wagon Road grant lands, and which in his opinion are chiefly valuable for grazing and raising forage crops: *Provided, That no lands withdrawn or reserved for any other purpose shall be included in any such district except with the approval of the head of the department having jurisdiction thereof.* \* \* \* [Italics supplied.]

I understand this question to be presented by reason of the fact that certain lands withdrawn or reserved for purposes other than grazing, and the primary jurisdiction of which is in some instances in other departments or agencies and in other instances in this Department, have been included in grazing districts "with the approval of the head of the department," under the quoted proviso. Since the language of the acreage limitation is addressed only to "vacant, unappropriated, and unreserved lands from any part of the public domain," but since "withdrawn or reserved" lands may in certain circumstances become part of a grazing district, the question whether in those circumstances the area of the lands in the latter category is chargeable to the defined acreage limitation inevitably is presented as the regulation and administration of the public lands for grazing purposes progresses.<sup>2</sup>

It is my opinion that the term "vacant, unappropriated, and unreserved lands from any part of the public domain," as employed in the acreage-limitation provision in section 1 of the Taylor Grazing Act, is not to be construed as including "lands withdrawn or reserved for any other purpose," to which reference is made in the proviso, and

<sup>2</sup> According to estimates furnished by the Grazing Service, the gross area within the exterior boundaries of the total of 60 grazing districts is approximately 265 million acres. This aggregate area comprises various classes of lands, including public lands administered by the Grazing Service as parts of grazing districts, public and reserved lands not administered for grazing purposes, private, State, and county lands administered by the Grazing Service under cooperative agreements, but not as parts of grazing districts, and lands both privately owned and privately managed. The best estimates now available indicate that approximately 132 million acres of "vacant, unappropriated, and unreserved lands" have been placed in grazing districts and that about 10 million acres of lands "withdrawn or reserved" for other purposes have been so included, "with the approval of the head of the department having jurisdiction thereof." The necessity of a determination whether additional lands may be placed in grazing districts thus is apparent.

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therefore that the acreage of the latter category of lands, when included in grazing districts "with the approval of the head of the department having jurisdiction thereof," is not to be included in computing the aggregate acreage of "vacant, unappropriated, and unreserved lands" permissible for inclusion in grazing districts. This opinion is based on the legislative history of section 1, the attitude of the Congress at the time of the 1936 amendment of the section, its contemporaneous administrative construction, and the legislative ratification of this construction.

It may be conceded that the language quoted from section 1 of the act, standing alone, is somewhat lacking in literary consistency, even apart from the narrow question here presented. It first authorizes the Secretary of the Interior to establish grazing districts, which are not to exceed "in the aggregate an area of one hundred and forty-two million acres of vacant, unappropriated, and unreserved lands from any part of the public domain of the United States \* \* \*." If the provision stopped at this point, I should doubt that the act authorized the inclusion in grazing districts of any lands of a character other than that defined, whatever "vacant, unappropriated, and unreserved" might be held to mean. The proviso, however, goes on to say that "no lands *withdrawn or reserved for any other purpose shall be included* in any such district *except* with the approval of the head of the department having jurisdiction thereof." [Italics supplied.] It thus is clear at least that, apart from the computation of acreages, grazing districts may include both "vacant, unappropriated, and unreserved" lands and lands "withdrawn or reserved" for other purposes.

It has been recognized also, in the consideration of a different aspect of the question, that section 1 is ambiguous as to the scope of the acreage limitation, and that resort must be had to its legislative history in determining the meaning of such limitation.<sup>3</sup>

This is not the first occasion for comment or decision upon this precise question. In an opinion approved by the Secretary of the Interior November 30, 1934,<sup>4</sup> shortly after the approval of the Taylor Grazing Act, this office was called upon to consider four questions involving the construction of section 1 of the act, the fourth of which was whether the acreage limitation<sup>5</sup> is applicable to the area withdrawn by the public notices of hearings preliminary to the establishment of grazing districts.<sup>6</sup> This question was answered in the nega-

<sup>3</sup> 38 Op. Atty. Gen. 350 (1935).

<sup>4</sup> M. 27839, 55 I. D. 89.

<sup>5</sup> At that time the limitation was 80 million acres. It was raised to 142 million acres by section 1 of the act of June 26, 1936 (49 Stat. 1976). See footnote 9, *infra*.

<sup>6</sup> Section 1 of the Taylor Grazing Act further provides that—

"\* \* \* Before grazing districts are created in any State as herein provided, a hearing shall be held in the State, after public notice thereof shall have been given,

tive, on the ground that the then existing 80-million-acre limitation was applicable only to the establishment of grazing districts, as distinguished from the area which could be withdrawn by the publication of notice. In conclusion, however, it was stated:

It may be noted in passing that the limitation applies specifically only to the "vacant, unappropriated, and unreserved lands" included within the districts, and does not restrict the area of reserved lands which may be included within the grazing districts as finally established. [55 I. D. at p. 95.]

Six years later, in response to a request from the Commissioner of the General Land Office, the Assistant Secretary issued instructions, dated December 6, 1940, "as to whether public lands within grazing districts, which are 'withdrawn or reserved for purposes not inconsistent with grazing' should be charged against the maximum 142,000,000 acres of 'vacant, unappropriated, and unreserved lands' that may be established as grazing districts." The instructions thus concluded:

Without attempting, therefore, to enumerate all classes of "withdrawn or reserved public lands" which may be included within grazing districts, but which are not chargeable against the 142,000,000 acreage limitation, you are instructed that the following classes referred to in your letter of April 29 are not chargeable: power-site reserves, public-water reserves, proposed monuments or parks, and classification in aid of legislation other than those lands covered by the two general withdrawal orders, Executive Orders Nos. 6910 and 6964.

This answer was based on an extended review of the legislative history of section 1, which need not be repeated here.

The administrative attitude toward the acreage limitation, both during the 6 intervening years and thereafter, has been consistent with this interpretation of section 1. The annual reports of the Secretary of the Interior invariably have distinguished between the two categories of lands.<sup>7</sup> In the report for the fiscal year ended June 30, 1935, which followed the first year of the administration of the Taylor Grazing Act, the "status of grazing districts" was tabulated in columns headed "Total acres" and "Public land acres." The total of the latter column, which then was 75,062,700 acres, was footnoted by a statement that it "Includes vacant, unreserved, unappropriated public land only; figures subject to revision" (p. 18). The report for

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at such location convenient for the attendance of State officials, and the settlers, residents, and livestock owners of the vicinity, as may be determined by the Secretary of the Interior. No such district shall be established until the expiration of ninety days after such notice shall have been given, nor until twenty days after such hearing shall be held: *Provided, however*, That the publication of such notice shall have the effect of withdrawing all public lands within the exterior boundary of such proposed grazing districts from all forms of entry of settlement. \* \* \*

<sup>7</sup> See Annual Report of the Secretary of the Interior for the Fiscal Year Ended June 30, 1935, p. 18; *id.*, 1936, p. 16; *id.*, 1937, p. 103; *id.*, 1938, p. 110; *id.*, 1939, pp. 327-328; *id.*, 1940, p. 338; *id.*, 1941, pp. 254-255; *id.*, 1942, p. 150; *id.*, 1943, p. 195.



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the fiscal year 1938 included the following statement under the heading "Status of Grazing Districts":

The 252,763,500-acre area embraced within the 49 grazing districts under regulation during the year naturally involves many different types of ownership. For the most part, the State and private grazing lands interspersed therein with public lands are similar to them and are leased and owned by livestock operators. In addition to the *112,823,338 acres of vacant, unappropriated, unreserved lands* affected by the withdrawal of November 26, 1934, there are more than *10,000,000 acres of prior withdrawals* within grazing districts, most of which, by agreement, are under temporary administration of the Division of Grazing. Lands in this category include stock driveways, power site reserves, military reserves, naval oil shale reserves, public water reserves, and reclamation withdrawals. [Italics supplied.] (P. 110.)

A similar statement appeared in the report for the fiscal year 1939 (pp. 327-328). In the report for the fiscal year 1941 the "status of grazing districts" was tabulated in columns headed "Vacant unappropriated public land," "Other public land," and "Other land." The first column, which totaled approximately 136 million acres, was footnoted by a statement that it "Represents vacant unappropriated public land chargeable against the 142-million-acre limitation in the Taylor Grazing Act as amended." The second column, which totaled something more than 8½ million acres, was footnoted by the explanation that it "Represents public land withdrawn or reserved for other purposes but which is administered by the Grazing Service under agreements." This tabulation was preceded by a statement which, while presumably not advertently addressed to the subject of the current question, nevertheless is highly significant:

The area of public land administered by the Grazing Service during the year totaled 144,873,200 acres. Approximately 8,535,000 acres of this total is included in public withdrawals for power, reclamation, naval oil stores, and other areas held in reserve for future needs. Thus, lands in grazing districts withdrawn for other purposes are beneficially used and conserved pending the time when they are put to the uses for which they were specifically set aside. [Pp. 254-255.]

Thus the Secretary of the Interior reported to the President nearly 5 years ago that almost 3 million acres of "public land" in excess of the maximum of 142 million acres of "vacant, unappropriated, and unreserved lands from any part of the public domain" which the Congress had prescribed, had been placed in grazing districts, *but that* "of this total" 8½ million acres are "included in public withdrawals for power, reclamation, naval oil stores, and other areas held in reserve for future needs." If lands "withdrawn or reserved for any other purpose" were to be regarded as chargeable to the 142-million-acre limitation, therefore, that limitation would long ago have been publicly exceeded. This long and consistent chain of contemporane-

ous administrative construction is in itself entitled to great weight in ascertaining the legislative intention.<sup>8</sup>

This construction of section 1 of the act furthermore seems hardly to be one which could have escaped the attention of the Congress throughout the past 10 years.<sup>9</sup> As an example, the justification for appropriations for the Interior Department for the fiscal year 1943 contained the following statement in support of the amount requested for the Grazing Service:

This appropriation is to finance the Grazing Service in the administration of grazing districts established under the provisions of the Taylor Grazing Act and the management and protection of the resources thereon. *The area under administration is approximately 145 million acres of publicly owned land interspersed with privately owned, State, and county land in a gross area of approximately 267 million acres. [Italics supplied.]*

This acreage figure, which was in excess of the 142 million acres of "vacant, unappropriated, and unreserved lands" prescribed in section 1 of the act, necessarily included the lands "withdrawn or reserved" for other purposes, placed in grazing districts "with the approval of the head of the department having jurisdiction thereof," and here in question. Section 10 of the Taylor Grazing Act<sup>10</sup> provides that "25 per centum of all moneys received under this Act during any fiscal year is hereby made available, when appropriated by the Congress, for expenditure by the Secretary of the Interior for the construction, purchase, or maintenance of range improvements \* \* \*." Pursuant to this provision, a part of the receipts from grazing fees collected for the use of all Federal range, including such "withdrawn or reserved" lands, regularly has been appropriated for range-improvement purposes.<sup>11</sup> The appropriation of funds with knowledge of the administrative construction being placed on a statute is significant.<sup>12</sup>

<sup>8</sup> *Norwegian Nitrogen Products Co. v. United States*, 288 U. S. 294, 315 (1933); *Inland Waterways Corp. v. Young*, 309 U. S. 517, 523 (1940); *United States v. American Trucking Ass'ns*, 310 U. S. 534, 549 (1940).

<sup>9</sup> While it is not controlling, it is worthy of note that the Congress seems to have been untroubled on this point when it amended section 1 of the act to raise the limitation from 80 million acres to 142 million acres, by section 1 of the act of June 26, 1938 (49 Stat. 1976). For a more complete review of the legislative history of this section, see the Assistant Secretary's Instructions of December 6, 1940, *supra*.

<sup>10</sup> 48 Stat. 1273; 43 U. S. C. sec. 3151.

<sup>11</sup> Interior Department Appropriation Act, 1936 (49 Stat. 176, 178); *id.*, 1937 (49 Stat. 1757, 1758); *id.*, 1938 (50 Stat. 564, 565); *id.*, 1939 (52 Stat. 291, 292); *id.*, 1940 (53 Stat. 685, 687); *id.*, 1941 (54 Stat. 406, 407); *id.*, 1942 (55 Stat. 303, 305); *id.*, 1943 (56 Stat. 506, 507); *id.*, 1944 (57 Stat. 451); *id.*, 1945 (58 Stat. 463, 464).

<sup>12</sup> *Wells v. Nickles*, 104 U. S. 444, 447 (1881); *Isbrandtsen-Moller Co. v. United States*, 300 U. S. 139, 147 (1937); *Brooks v. Dewar*, 313 U. S. 354, 360, 361 (1941). In the last case, the plaintiff contested the authority of the Secretary of the Interior to charge fees for temporary grazing licenses under the Taylor Grazing Act. The Court upheld the Secretary's authority without undertaking to construe the language of the act, saying:

"With knowledge that the Department of the Interior was issuing temporary licenses instead of term permits and that uniform fees were being charged and collected for the issue of temporary licenses, Congress repeatedly appropriated twenty-five per cent.

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## II

It is my opinion that the answer to the second question must be that the acreage maximum of "vacant, unappropriated and unreserved" lands which may be included within grazing districts may not be exceeded at any particular point of time, and consequently that fluctuations in the acreage of such lands may be significant in the determination of adherence to the statutory requirement.

The date of the act scarcely could be regarded as either a satisfactory or a sensible standard, since its application necessarily would foreclose in perpetuity the inclusion in grazing districts of any lands which at the date of the enactment of the act were withdrawn, reserved, or alienated in any manner, including large acreages of stock-driveway withdrawals under section 10 of the act of December 29, 1916,<sup>13</sup> which since have been vacated, and homestead entries which since have been relinquished or canceled.<sup>14</sup> These observations need not be inconsistent with the Acting Attorney General's opinion of October 19, 1935.<sup>15</sup> It is true that it was there stated that "not more than 80,000,000 acres of the lands which were vacant, unappropriated, and unreserved at the time the Act became effective should be included in the grazing districts authorized by the Act." This language, however, must be appraised in its context, and the only question before the Acting Attorney General was whether the acreage limitation applied to the lands reserved by Executive Order No. 6910, dated November 26, 1934,<sup>16</sup> 5 months subsequent to the approval of the Taylor Grazing Act, and which temporarily withdrew from "settlement, location, sale or entry"<sup>17</sup> all of the vacant, unreserved and unappropriated public land in the grazing States. In referring to the lands which were "vacant, unappropriated, and unreserved at the time

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of the money thus coming into the Treasury for expenditure by the Secretary in improvements upon the ranges. The information in the possession of Congress was plentiful and from various sources. *It knew from the annual reports of the Secretary of the Interior that a system of temporary licensing was in force. The same information was furnished the Appropriations Committee at its hearings. Not only was it disclosed by the annual report of the Department that no permits were issued in 1936, 1937, and 1938, and that permits were issued in only one district in 1939, but it was also disclosed in the hearings that uniform fees were being charged and collected for the issue of temporary licenses. And members from the floor informed the Congress that the temporary licensing system was in force and that as much as \$1,000,000 had been or would be collected in fees for such licenses. The repeated appropriations of the proceeds of the fees thus covered, and to be covered, into the Treasury, not only confirms the departmental construction of the statute, but constitutes a ratification of the action of the Secretary as the agent of Congress in the administration of the act.*" [Italics supplied.]

<sup>13</sup> 39 Stat. 862; 43 U. S. C. sec. 300.

<sup>14</sup> Cf. Annual Report of the Secretary of the Interior for the Fiscal Year Ended June 30, 1942, p. 149, in which it was reported that "About 93,000 acres were added to districts by orders revoking stock-driveway withdrawals created by other public land laws."

<sup>15</sup> Footnote 3, *supra*.

<sup>16</sup> 54 I. D. 539.

the Act became effective," the Acting Attorney General seems clearly to have been addressing himself solely to the contrast between the situation as of the date of the act and that as of 5 months later, in determining whether the acreage limitation had *any* effect. The narrower question now before us was neither presented nor recognized in that opinion. That the Acting Attorney General was concerned only with the effect of Executive Order No. 6910 seems clear from the following excerpts from his opinion:

In examining the legislative history of the Act it is important to bear in mind that at the time the bill was before the Congress Executive Order No. 6910 had not been issued. Consequently, there were at that time in the states now covered by Executive Order No. 6910 approximately 173,000,000 acres of vacant, unappropriated, and unreserved public lands available for the creation of grazing districts, all of which 173,000,000 acres are now reserved by said Executive Order. It is also important to bear in mind that this 173,000,000 acres constituted practically all of the vacant, unappropriated, and unreserved public lands suitable for grazing purposes.

\* \* \* \* \*

To hold that the limitation in section 1 of the Taylor Grazing Act does not apply to lands reserved by Executive Order No. 6910 would seem to lead to an unreasonable result. As already stated, and as shown by the above-mentioned Committee Reports, at the time the Taylor Grazing Act was passed practically all of the then vacant, unappropriated, and unreserved public land suitable for grazing, consisting of approximately 173,000,000 acres was situated in those states now covered by Executive Order No. 6910. The effect of the Executive Order was, therefore, to withdraw and reserve practically all of the public lands suitable for grazing that were unreserved at the time the Act was passed. If the land so withdrawn could be included in grazing districts without restriction as to acreage, practically the whole of the public land unreserved at the time the Act was passed could be so included. \* \* \* [Pp. 352, 355.]

There is nothing in the foregoing which need suggest that lands withdrawn for specific purposes other than grazing, as distinguished from those generally withdrawn, as by Executive Order No. 6910, are chargeable to the statutory acreage limitation. It is further true that the opinion continued to say:

\* \* \* Moreover, if the lands withdrawn by Executive Order No. 6910 could be included without restriction as to acreage, it would follow that land withdrawn under any other order, issued after the Act became effective, could be so included. Hence, practically all public lands of the United States, chiefly suitable for grazing and raising forage crops, could be included in the grazing districts authorized by the Act, as reserved lands. Under such circumstances, the grazing districts might include practically all public lands suitable for grazing purposes and still consist almost wholly of reserved lands—a situation certainly not contemplated by the statute. [P. 355.]

This language still is not addressed specifically to the kinds of reserves which are the subject of this opinion, but rather speaks in terms of the effect of an abstract withdrawal. In my opinion, therefore, it does no violence to rhetoric to construe the opinion as holding in effect that

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the "lands withdrawn or reserved for any other purpose" which are not to be counted in connection with the 142,000,000-acre limitation must be lands withdrawn for primary purposes other than grazing, and cannot include lands withdrawn by a general order of the character of Executive Order No. 6910.<sup>17</sup>

As a logical consequence of the answer to question 1, it is my opinion that there may not at any particular point of time be more than 142 million acres of "vacant, unappropriated, and unreserved" lands in grazing districts. In practical application, therefore, if the precise 142-million acreage of such lands should at some point of time be reached, and if, for example, a withdrawal for a power-site reserve already included within a grazing district thereupon should be vacated, I take it that it would be incumbent on the Secretary of the Interior to reduce the aggregate acreage of lands within grazing districts by an equivalent amount. Conversely, if at the same point of time a portion of the 142 million acres should be withdrawn and reserved for a purpose other than grazing, an equivalent acreage of "vacant, unappropriated, and unreserved" lands could be added to grazing districts.

In summary, the following are my answers to the two questions submitted:

1. The term "vacant, unappropriated, and unreserved lands from any part of the public domain of the United States," as employed in the acreage-limitation provision in section 1 of the Taylor Grazing Act, does not include "lands withdrawn or reserved for any other purpose," to which reference is made in the proviso, and the acreage of the latter category of lands, when included in grazing districts "with the approval of the head of the department having jurisdiction thereof," is not to be included in computing the aggregate acreage of "vacant, unappropriated, and unreserved lands" permissible for inclusion in grazing districts.

2. There may not at any particular point of time be more than 142 million acres of "vacant, unappropriated, and unreserved" lands in grazing districts.

FELIX S. COHEN,  
*Acting Solicitor.*

Approved:

OSCAR L. CHAPMAN,  
*Assistant Secretary.*

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<sup>17</sup> Perhaps another way of putting this is to say that under the Attorney General's opinion the words "vacant, unappropriated, and unreserved" may have differing meanings for the purposes of the application of Executive Order No. 6910 and the operation of the acreage limitation. For a discussion of the differing meaning of these words in different circumstances, see First Assistant Secretary's Instructions to Commissioner of the General Land Office, September 14, 1936, 56 I. D. 404, 406.

**EXCHANGE OF TRUST OR RESTRICTED INDIAN LAND FOR OTHER LAND OF THE INDIAN'S SELECTION UNDER AUTHORITY OF THE ACT OF JUNE 30, 1932**

**Alienation of Restricted Indian Land—Exchange of Restricted or Trust Lands for Other Lands—Tax-Exemption Status of Land so Acquired.**

The act of June 30, 1932 (47 Stat. 474), authorizes the sale and purchase, but it does not prohibit the exchange, of restricted or trust Indian lands for other lands of the Indian's selection so long as the Indian receives equivalent value. The consideration need not be in money. It may be money's worth. Lands so acquired under the act of June 30, 1932, *supra*, are restricted against alienation, lease, or incumbrance, and nontaxable in the same quantity and upon the same terms and conditions as the trust lands exchanged therefor.

M-34027

APRIL 5, 1945.

**TO THE COMMISSIONER OF INDIAN AFFAIRS.**

In accordance with your request of January 9, an examination has been made of the title data relating to 320 acres of land in Valley County, Montana, proposed to be acquired by Joyce Ann Clark, minor Fort Peck allottee No. 4101, from Henry P. Unrau, a non-Indian. The consideration is the conveyance of the 320-acre trust allotment of Joyce Ann Clark to Henry P. Unrau under the authority of the act of June 30, 1932 (47 Stat. 474). The reference number is Land-Ten. & Acq. 92-45.

Some question has been raised concerning the acquisition of the land by the exchange of the trust allotment under the authority of the act of June 30, 1932, *supra*, which provides that when lands of a restricted Indian are sold under any existing law the proceeds may, with the approval of the Secretary, be reinvested in other lands selected by the Indian, and the purchased lands shall be restricted against alienation, lease, or incumbrance, and nontaxable in the same quantity and upon the same terms and conditions as the nontaxable lands from which the reinvested funds were derived. The white-owned land is appraised at \$1,280 and the trust allotment at \$800. The parties to the exchange have agreed to exchange one parcel of land for the other and therefore, as between the parties, the lands are considered to be of equal value. Under the act of June 30, 1932, the land received by the Indian becomes restricted and nontaxable in the same quantity and upon the same conditions as the trust land which was the consideration for the acquisition. In my opinion, a sale may be effected by means of an exchange. The consideration need not be in money. It may be money's worth. *Washington County v. Lynn Shelton Post No. 27*, 144 S. W. (2d) 20 (1940), citing *Roberts v. Northern Pacific R. R. Co.*, 158 U. S. 1 (1895); *Little Rock*

April 30, 1945

*Chamber of Commerce v. Pulaski County*, 168 S. W. 848 (1914); *Keatley v. Summers County Court*, 70 W. Va. 267, 73 S. E. 706, Ann. Cas. 1913 E 523 (1912), and *Ivy v. Edwards*, 298 S. W. 1006 (1927).  
*Accord*: Opinion, August 17, 1942, 58 I. D. 81.

While the precise letter of the statute could be carried out by selling the trust allotment to the white man for cash and thereafter repaying the same moneys to the white man in consideration for the conveyance of his land to the Indian, surely Congress did not intend to complicate the mechanics of the transaction by requiring an unnecessary and ceremonious sale and purchase. Realistically speaking, this circuitous procedure can lead to nothing but an exchange.

Apparently the Department has interpreted the act of June 30, 1932, to authorize the acquisition of other lands selected by the Indian through the medium of an exchange and has approved such exchanges over a period of years. See Indian Office Crow-Land Sales file No. 5-1 (part 9), and Fort Peck-Land Sales file No. 5-1 (part 6). It is elementary that when administrative officers interpret an act of Congress in a certain manner and over a period of years approve transactions under such interpretation the courts will recognize and uphold such administrative interpretation. To do otherwise would cause innumerable administrative actions made in good faith and based upon sound reasoning to be void. I therefore am of the opinion that so long as adequate value in land is received by the Indian for the restricted lands exchanged therefor, such transactions are authorized by the act of June 30, 1932, *supra*.

\* \* \* \* \*

FOWLER HARPER,  
*Solicitor.*

## INVENTION OF ELECTRICAL SYMBOL DRAWING TEMPLATE

### Public Use of Invention—Section 4886, Revised Statutes, as Amended.

The use of an invention made by an employee of the Bureau of Reclamation, without restriction, by others in his office constitutes a public use of the invention.

The public use of an invention for more than 2 years without filing a patent application thereon is a bar to the issuance of a valid patent thereon under section 4886, Revised Statutes, as amended by the act of August 5, 1939 (53 Stat. 1212; 35 U. S. C. sec. 31).

An invention upon which the issuance of a patent is barred by public use for more than 2 years may be freely used by the Government or any other person.

M-34060

APRIL 30, 1945.

THE SECRETARY OF THE INTERIOR.

MY DEAR MR. SECRETARY: My opinion has been requested concerning the relative rights of the Government and the inventor to an Electrical Symbol Drawing Template invented by Thomas J. Knill, an engineering draftsman employed by the Bureau of Reclamation at Denver, Colorado.

Mr. Knill's invention report states that the template was made without any sketch, drawing, or description in March 1943. It was put into immediate use by the Tracing Section, Office and Contract Engineering Division, Branch of Design and Construction, where Mr. Knill was employed. There appear to have been no restrictions placed upon its use, and no injunctions of secrecy. Accordingly, the invention has been in public use for more than 2 years, even though that use may have been confined, as a practical matter, to a few draftsmen in Mr. Knill's section. *Egbert v. Lippmann*, 104 U. S. 333 (1881).

Public use of an invention in this country for more than a year prior to the filing of a patent application is a bar to the issuance of a valid patent under section 4886, Revised Statutes, as amended by the act of August 5, 1939 (53 Stat. 1212; 35 U. S. C. sec. 31). Since Mr. Knill's invention has been in public use for longer than the statutory period, it is not patentable, and may be freely used by the Government or by any other person.

FOWLER HARPER,  
*Solicitor.*

Approved:

MICHAEL W. STRAUS,  
*Assistant Secretary.*

#### INCLUSION OF POWER COSTS IN CONSTRUCTION COSTS OF FLAT- HEAD IRRIGATION PROJECT IN APPLYING REPAYMENT CON- TRACT REQUIREMENTS OF FLATHEAD PROJECT LEGISLATION

Irrigation—Flathead Project Legislation, Especially Act of May 10, 1926 (44 Stat. 453, 464-466)—Compatibility of Repayment Contracts with Requirements of Legislation with Reference to Inclusion of Power Costs in Construction Costs.

The provisions of the repayment contracts between the United States and the Flathead irrigation district, the Jocko Valley irrigation district, and the Mission irrigation district, which limit construction costs to specified amounts per acre but include power development costs as part of the construction costs of the Flathead irrigation project, are in harmony in this respect with the acts of Congress in accordance with which the project was built.



May 2, 1945

Neither the language of the Flathead project legislation nor its legislative or departmental history reveals any intention to segregate power construction costs from irrigation construction costs, so far as the repayment contract requirements of the legislation are concerned.

The approval of the repayment contracts by the Department constitutes a practical contemporaneous construction of the requirements of the legislation.

Power development has always been an integral part of the irrigation project system.

The term "construction costs," as employed in the Flathead project legislation, includes all construction costs.

To exclude power costs from construction costs would, in effect, make the former a deferred obligation, but the only such obligation specifically deferred is the excess cost of the Camas division of the project. The fact that the legislation provides that the power construction costs are to be liquidated first from the net power revenues is of no significance, since various other obligations were also to be liquidated from these revenues, including irrigation construction costs.

The lien provisions of the legislation apply to power as well as irrigation construction costs and are not contingent on lack of power revenue.

The directions in the legislation for the issuance of a public notice refer to "the total unpaid construction costs."

The maintenance of a separate bookkeeping account for power is also of no significance, since power revenues are set aside for certain purposes.

The fact that the power development is capable of continuous expansion only demonstrates the desirability of limiting the power costs.

Repayment contract requirements of irrigation legislation should be strictly construed to insure the reimbursement of the Government.

Since the cost limitations on the Flathead and Mission Valley divisions of the project have already been exceeded, no further construction may be undertaken without securing supplemental repayment contracts with these districts.

M-33965

MAY 2, 1945.

THE SECRETARY OF THE INTERIOR.

MY DEAR MR. SECRETARY: You have requested my opinion on the question whether certain provisions of the repayment contracts between the United States and the Flathead irrigation district, the Jocko Valley irrigation district, and the Mission irrigation district, which limit construction costs to specified amounts but include power development costs as part of the irrigation construction costs of the Flathead irrigation project, are in harmony in this respect with the acts of Congress in accordance with which the project was built.<sup>1</sup>

<sup>1</sup> April 23, 1904 (33 Stat. 302, 305), sec. 14; June 21, 1906 (34 Stat. 325, 355), sec. 19; April 30, 1908 (35 Stat. 70, 83); May 29, 1908 (35 Stat. 444), sec. 15; March 3, 1909 (35 Stat. 781, 795); April 4, 1910 (36 Stat. 269, 277); March 3, 1911 (36 Stat. 1058, 1066); August 24, 1912 (37 Stat. 518, 526); June 30, 1913 (38 Stat. 77, 90); August 1, 1914 (38 Stat. 582, 585, 593); May 18, 1916 (39 Stat. 123, 139, 142); March 2, 1917 (39 Stat. 969, 980); May 25, 1918 (40 Stat. 561, 574); June 30, 1919 (41 Stat. 3, 16); February 14, 1920 (41 Stat. 408, 421); March 3, 1921 (41 Stat. 1225, 1237); May 24, 1922 (42 Stat. 552, 571); January 24, 1923 (42 Stat. 1174, 1192); June 5, 1924 (43 Stat.

Under the provisions of the repayment contracts,<sup>2</sup> the construction costs are limited in the case of the Flathead irrigation district to \$65 per acre, in the case of the Jocko Valley irrigation district to \$55 per acre, and in the case of the Mission irrigation district to \$65 per acre.

It appears that the total reimbursable construction costs of the Flathead irrigation project to June 30, 1944, were \$9,549,937.46, of which \$8,634,704.57 represented the cost of constructing irrigation facilities, and \$915,232.89 represented the cost of the power facilities. When the total reimbursable costs for construction, including the cost of the power facilities, are prorated among the various divisions of the projects,<sup>3</sup> it will be found that the contract limitations with the Flathead irrigation district and the Mission irrigation district have already been exceeded to the extent of \$1.23 per acre. On the other hand, if the power costs are not included as part of the total construction costs, and the contract limitations are applied solely to the cost of irrigation facilities, it would be possible to expend approximately \$5 per acre for additional construction in the Mission Valley division of the project without securing a supplemental contract with the Flathead irrigation district, and the Mission irrigation district, and approximately \$7.37 per acre on the Jocko division of the project without securing a supplemental contract with the Jocko Valley irrigation district.

I think that I should begin by pointing out that the question presented to me is of a rather anomalous character. It will be observed that the Indian Office, which suggested the submission of the question, assumes that the contracts with the irrigation districts include the power costs in the total construction costs, and apply the cost limitations to this total cost. This conclusion is indeed inescapable. The relevant provisions of the repayment contracts<sup>4</sup> all expressly provide: "Construction costs, repayment of which is provided for by this contract, shall embrace all expenses of whatever kind incurred by the

390, 402); December 6, 1924 (43 Stat. 704, 707); March 3, 1925 (43 Stat. 1141, 1153); May 10, 1926 (44 Stat. 453, 464-466); January 12, 1927 (44 Stat. 934, 945); March 7, 1928 (45 Stat. 200, 212); March 4, 1929 (45 Stat. 1562, 1574, 1576, 1623, 1639); May 14, 1930 (46 Stat. 279, 291); February 14, 1931 (46 Stat. 1115, 1127); March 4, 1931 (46 Stat. 1552, 1567); April 22, 1932 (47 Stat. 91, 101); February 17, 1933 (47 Stat. 820, 830); March 4, 1933 (47 Stat. 1602, 1608); May 9, 1935 (49 Stat. 176, 187).

<sup>2</sup> Section 11 of the contract with the Flathead irrigation district made May 12, 1928, and approved November 24, 1928; section 17 of the contract with the Jocko Valley irrigation district, made November 13, 1934, and approved February 26, 1935, as modified by the supplemental contract made June 4, 1940, and approved September 9, 1940; section 13 of the contract with the Mission irrigation district, made April 21, 1931, and approved August 21, 1931.

<sup>3</sup> The project consists of three divisions: The Mission Valley, Camas, and Jocko divisions. The Mission Valley division includes the Mission district and the Flathead district, except the Camas area.

<sup>4</sup> See footnote 2, *supra*.

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United States \* \* \*," and to leave no doubt that the "construction costs" also include power costs, also provide that "the work proposed to be done within the limit of cost herein fixed and within appropriations of funds therefor by Congress, shall include \* \* \* power development and transmission lines \* \* \*." Section 10 of the Flathead contract also provides: "Within the limits of cost herein-after fixed for the several districts, depending in each instance upon their signing this contract, the United States will make such improvements and extensions of the irrigation system of such project and such power development in connection with the same as or may be authorized and appropriated for by Congress; \* \* \*." <sup>5</sup>

Now these contracts were drafted in the Indian Office and approved after review by the legal and administrative officers of the Department who had drafted the legislation which authorized the power development. The approval of the contracts thus amounted to a practical construction of the authorizing legislation to which on familiar principles the greatest weight must be given, and only the most cogent and compelling reasons could justify upsetting this construction. It is true that in recent years the contract limitations have been exceeded, and this too amounts to a practical construction. But not only is this construction not contemporaneous,<sup>6</sup> having occurred after the lapse of almost two decades since the present power development was authorized, but it represents action taken in the Indian Office or in the field without departmental approval. I find, however, nothing in the history of the power development on the Flathead project, and no such ambiguity in the applicable legislation that would justify me in disregarding the contemporaneous administrative construction. In detail my conclusion is based upon the following considerations:

1. The power development on the Flathead irrigation project is not an independent enterprise but owed its origin to the necessities of the irrigation development, and has always been an integral part of such development. Indeed, the original plan of the project seems to have contemplated power development only for pumping to supplement the gravity water supply, the hydroelectric energy to be generated at a dam which was to be constructed across Flathead River. The act of March 3, 1909 (35 Stat. 781, 795), appropriated \$250,000 for construction work on the Flathead irrigation project. As a part of this project, approximately \$101,000 was expended during 1910 and 1911 on

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<sup>5</sup> Sections 16 and 12, respectively, of the Jocko and Mission contracts contain almost identical provisions.

<sup>6</sup> While project officials may have entertained opinions concerning the application of the construction cost limitation of the repayment contracts at any time since their execution, no occasion for actually applying the limitation could have arisen until very recently.

the Newell Tunnel which was to be a part of the power development then contemplated.<sup>7</sup> Subsequently, however, the plan for a project power plant was abandoned; the Newell Tunnel was disposed of to the Rocky Mountain Power Company, a subsidiary of the Montana Power Company which leased the power site on the reservation, and in 1930 secured a license from the Federal Power Commission. Except for a small hydroelectric plant which has been operated by the project since 1931, the power now used by the project is secured from this power utility, and the power development of the project now consists primarily of a transmission line system.<sup>8</sup> While the power is also sold under contract to various farm, commercial, and domestic power users, a large part of the available power is still employed for pumping and other project operations.

2. The act of May 10, 1926, which initiated the modern phase of the power development contains no provision which segregates, or has the effect of segregating, the power construction costs from the irrigation construction costs. The total sum of \$575,000 made available by the act is appropriated for "continuing construction, maintenance, and operation of the irrigation systems on the Flathead Indian Reservation, in Montana \* \* \*." This sum is then made available "for the construction items hereinafter enumerated in not to exceed the following amounts," and then follows the enumeration of the separate items of construction, which consist of work on various canals, and "continuing construction of power plant." Immediately following the reference to the power plant is a proviso to the effect that no part of the appropriation made available should be expended on construction work until an appropriate repayment contract had been executed "which contract, among other things, shall require repayment of *all* construction costs heretofore or hereafter incurred on behalf of such lands," with a stated exception, and upon certain terms and conditions. Thus the material portion of the act reads as follows:

For continuing construction, maintenance, and operation of the irrigation systems on the Flathead Indian Reservation, in Montana, by and under the

<sup>7</sup> Thus the appropriation available for construction was used to finance the power development, and since the act of April 4, 1910 (36 Stat. 269, 277), made all sums theretofore or thereafter appropriated reimbursable, the amount became part of the reimbursable cost of the project. It was, however, subsequently reimbursed to the United States by the Rocky Mountain Power Company which acquired the Newell Tunnel. The public notice of November 1, 1930, provided that the cost of the tunnel should be reimbursed if the Rocky Mountain Power Company failed to do so.

<sup>8</sup> The acts of May 10, 1926 (44 Stat. 453, 465), and January 12, 1927 (44 Stat. 934, 945), provided funds for "continuing construction of power plant," but the act of March 7, 1928 (45 Stat. 200, 212), provided that the funds previously appropriated "for continuation of construction of a power plant" might be used "for the construction and operation of a power distributing system and for purchase of power for said project \* \* \*," and similar provisions were made in the subsequent acts of March 4, 1929 (45 Stat. 1623, 1639), May 14, 1930 (46 Stat. 279, 291), and February 14, 1931 (46 Stat. 1115, 1127).

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direction of the Commissioner of Indian Affairs, including the purchase of any necessary rights or property, \$575,000: *Provided*, That of the total amount herein appropriated not to exceed \$15,000 shall be available for operation and maintenance of the project, the balance to be available for the construction items hereinafter enumerated in not to exceed the following amounts: Pablo Feed Canal enlargement, \$100,000; Moiese Canal enlargement, \$15,000; South Side Jocko Canal, \$40,000; Hubbart Feed Canal, \$7,500; Camas A Canal, \$2,500; continuing construction of power plant, \$395,000, of which sum \$15,000 shall be immediately available for additional surveys and preparation of plans: *Provided further*, That no part of this appropriation, except the \$15,000 herein made immediately available, shall be expended on construction work until an appropriate repayment contract, in form approved by the Secretary of the Interior, shall have been properly executed by a district or districts organized under State law embracing the lands irrigable under the project, except trust patent Indian lands, which contract, among other things, shall require repayment of all construction costs heretofore or hereafter incurred on behalf of such lands, with provision that the total construction cost on the Camas Division in excess of the amount it would be if based on the per acre construction cost of the Mission Valley Division of the project, shall be held and treated as a deferred obligation to be liquidated as hereinafter provided. Such contract shall require that the net revenues derived from the operation of the power plant herein appropriated for shall be used to reimburse the United States in the following order: First, to liquidate the cost of the power development; second, to liquidate payment of the deferred obligation on the Camas Division; third, to liquidate construction cost on an equal per acre basis on each acre of irrigable land within the entire project; and fourth, to liquidate operation and maintenance costs within the entire project. \* \* \*: *Provided further*, That all construction, operation, and maintenance costs, except such construction costs on the Camas Division held and treated as a deferred obligation herein provided for, on this project shall be, and are hereby, made a first lien against all lands within the project \* \* \*: *Provided further*, That pending the issuance of public notice the construction assessment shall be at the same rate heretofore fixed by the Secretary of the Interior, but upon issuance of public notice the assessment rate shall be 2½ per centum per acre, payable annually, in addition to the net revenues derived from operations of the power plant as hereinbefore provided, of the total unpaid construction costs at the date of said public notice: *Provided further*, That the public notice above referred to shall be issued by the Secretary of the Interior upon completion of the construction of the power plant.<sup>9</sup>

3. It will be observed that the act of May 10, 1926, like the repayment contracts themselves, which are based upon the language of the act, speaks of "construction costs" and "construction work." It is true that "continuing construction of power plant" is an item listed separately, but it is nevertheless listed as a construction item. The language of the act and the repayment contracts can be construed as permitting power construction without the execution of a payment contract only by assuming that "construction costs" refer exclusively to "irrigation construction costs." Such a construction would be

<sup>9</sup> The subsequent acts made further appropriations with provisions for repayment subject to the same terms and conditions. The act of March 7, 1928, provided further that the public notice should be issued by the Secretary of the Interior on November 1, 1930.

wholly illogical, however. "Construction costs" is a term inclusive of all costs, and there is no distinction made in the statute between "irrigation construction costs" and "power construction costs." Moreover, to make such a distinction, it would be necessary to disregard the traditional terminology of Indian irrigation legislation in which there have always been only two basic classifications of charges, namely, "construction costs," and "operation and maintenance costs." Some of the operation and maintenance charges for the Flathead project have actually been covered into the construction costs, but this was done only by virtue of express provisions in the statutes governing the Flathead project.

4. Of particular significance is the provision in the act of May 10, 1926, and the subsequent acts, which except the excess cost on the Camas division of the project from the requirement that they be covered by a repayment contract, and from the lien provision of the act. The costs on the Camas division, compared to those on the Mission Valley division, were so high as to be uneconomic, by virtue of the fact that the lands in this division represent only a small acreage, and the irrigation works in this division are extensive. Provision was made therefore for deferring the payment of this obligation until such time as it could be liquidated from the net power revenues, and the act so provides. This provision made the excess Camas cost a deferred obligation, however, and therefore there was no need to cover them by repayment contract. To argue that the power costs are not to be regarded as part of the construction costs is in effect to take the position that, like the excess Camas costs, they constitute a deferred obligation. But they are nowhere mentioned as such in the statutes. The only conceivable justification for treating the power construction costs as a deferred obligation would have to be based upon the fact that the statutes directed that the repayment contracts should stipulate that the power construction costs were to be liquidated first from the net power revenues, and that therefore there was no need to include them as a part of the construction costs. Such an argument, however, would prove far too much. The statutes also provided that the net power revenues were to be applied to liquidation of the construction costs, but it would be obviously absurd to contend that these were to be liquidated only from the net power revenues. The fact that the power construction costs were to be liquidated first is of no particular significance, since, if the net revenues from power were to be applied to various purposes, some order of priority had to be established. It is equally vain to attempt to argue that the favored place of the power construction costs in this order of priority made it a certainty that these costs would be repaid. This is to substitute hindsight for foresight. It is true that the net power revenues, which now amount to about three-quarters

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of a million dollars, are almost sufficient now to repay the power construction costs provided that the power facilities are not further expanded, but there were doubting Thomases when the power development was first being discussed.<sup>10</sup> The argument must rest upon a certainty, but it rests at most only upon a possibility. There is far more than a possibility, however, that the net power revenues will be sufficient to liquidate at least a part of the irrigation construction costs. Yet *all* the irrigation construction costs are covered by the repayment contract, and are concededly included in the amount to which the cost limitations of the repayment contracts are applicable.

5. That the power construction costs were not treated as a deferred obligation is further established by the lien provisions of the Flathead irrigation legislation. The deferment of an obligation and the imposition of a present lien would seem to be mutually inconsistent. In Indian irrigation legislation the lien has uniformly been imposed to secure an unconditional obligation arising from construction costs. It is true that theoretically a lien for construction could be imposed perhaps as a form of secondary security to protect the United States in case there should be no net power revenues. But such a lien would be of a unique character, without parallel or precedent in the whole history of Indian irrigation legislation, and is certainly not to be brought into existence by mere implication. If the lien were a sort of "second mortgage," the statute which created it would have to specify when it should be enforced. If the United States were to look primarily to the net power revenues for reimbursement, the statute would have to declare when the period of waiting should end. No such provision is to be found, however, in any of the Flathead irrigation project statutes. Furthermore, if the lien provision could be construed as a form of second mortgage, it would only underline the fact that the drafters of the legislation at least assumed the possibility that the net power revenues might not be sufficient to liquidate the power construction cost.

6. The final proviso of the 1926 act directs the issuance of a public notice, and prescribes the method of making an annual assessment. While the public notice would bind lands without, as well as within, irrigation districts, and the reimbursable costs need not necessarily be the same as the costs that must be recovered by repayment contract, it is nevertheless significant that the basis of the assessment prescribed is "the total unpaid construction costs." Thus again no distinction was made between irrigation and power construction costs, and, as already noted, the public notice made provision for the reim-

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<sup>10</sup> House Hearings on Interior Department Appropriation Bill, 1927, pp. 233, 234; Senate Hearings on Interior Department Appropriation Bill, 1927, p. 51.

bursement of the cost of the Newell Tunnel, which was part of the power development, if the amount should not be paid by the Rocky Mountain Power Company. Furthermore, it is of some significance that the act also provided that the public notice should not be issued until after "completion of the construction of the power plant," although this direction was altered by the act of March 7, 1928, which provided that the public notice should be issued on November 1, 1930. It must have been realized by then that the power system would necessarily be an expanding enterprise.

7. There are various items of legislative or departmental history which further confirm the conclusion that power construction costs were intended to be covered by repayment contracts—

(a) Congressman Louis C. Cramton, who was a leading figure in the House in the consideration of legislation relating to the Flathead irrigation project, made the following statement with reference to the language contained in the 1926 act:<sup>11</sup>

We come now to the Flathead Indian Reservation. In the current bill there is an appropriation of \$575,000 for the Flathead project, of which \$15,000 was available for operation and maintenance. Further than that, there is \$560,000 for construction of which \$15,000 was made immediately available for surveys and preparation of plans. Of the remaining \$545,000, \$165,000 was for construction of certain items, such as the Pablo Feed Canal enlargement, the Moiese Canal enlargement, the Southside Jocko Canal, the Hubbard Feed Canal, the Camas A Canal, and the remainder, which I think was \$380,000, *for continuing construction of the power plant. All this construction work, and the expenditure of the \$545,000, was dependent upon the execution of an appropriate repayment contract, in form approved by the Secretary of the Interior, by district or districts, where united under State law, embracing lands in the district, etc., and various requirements are set forth in the act. [Italics supplied.]*

At the same time Assistant Commissioner of Indian Affairs, Mr. E. B. Meritt, made the following statement:<sup>12</sup>

A first lien is created against all lands within the project to assure repayment of *all* obligations, except the deferred obligation on the Camas division \* \* \*.

(b) During the Hearings on the Interior Department Appropriation Bill, 1930, Congressman Cramton also made this statement:<sup>13</sup>

For the current year the act provides that the unexpended balance of the appropriation for continuing construction of the irrigation systems referred to shall remain available in 1929 under the conditions of the former act. Then it is provided that the unexpended balance of the \$395,000 available for construction of a power plant might be used in the discretion of the Secretary of the Interior for the construction and operation of a power distributing system or for purchase of power for such project, *but shall be available for that purpose only upon execution of an appropriate repayment contract. [Italics supplied.]*

<sup>11</sup> House Hearings on Interior Department Appropriation Bill, 1928, 69th Cong., 2d sess., p. 205.

<sup>12</sup> *Ibid.*, p. 206.

<sup>13</sup> House Hearings on Interior Department Appropriation Bill, 1930, 70th Cong., 2d sess., p. 899.



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(c) In a letter of December 6, 1927, from the Commissioner of Indian Affairs to the Secretary of the Interior, approved December 16, 1927, the Commissioner stated:<sup>14</sup>

The item in the Act of May 10, 1926 appropriated \$575,000.00, which sum, excepting \$15,000.00 available for operation and maintenance of the project, was for certain construction work therein named, *including the beginning of construction of a power plant.* \* \* \* [Italics supplied.]

(d) In a letter of November 22, 1928, C. J. Moody, Flathead Project Engineer, wrote to the Commissioner of Indian Affairs as follows:

Your attention is also called to the appropriation for the construction of transmission lines included in the last appropriation act for the Flathead project. No plans for the construction of this system or the use of funds appropriated can be made until either the Mission or Jocko Valley Irrigation District has executed their repayment contract in addition to the Flathead Irrigation District which has now executed their part; \* \* \*

8. In submitting the request for the present opinion, the Indian Office transmitted a letter dated January 11, 1945, from Mr. W. S. Hanna, District Engineer, to Mr. E. C. Fortier, Director of Irrigation, in which a number of arguments are made in support of the exclusion of power construction costs from the repayment requirements of the contracts. The comments made thus far should serve to dispose of these arguments but some further examination of some phases of them would seem to be desirable.

(a) Mr. Hanna refers to a petition to Congressman Cramton circulated in 1925 which discussed estimated costs for a "completed irrigation system." Certainly this reference to a "completed irrigation system" does not exclude a power development as part of such system, and in any event a petition circulated in 1925 would not be decisive as to what Congress intended to do in 1926, especially when the Congressman to whom it was addressed subsequently made it clear that the repayment contract requirement extended to the power costs.

(b) Mr. Hanna points out that since the fall of 1930 a separate bookkeeping account has been maintained for power construction costs. The maintenance of such an account would prove nothing, however, as to whether the funds in this account were to be regarded as part of the project construction costs, since the statutes did provide for a special application of the power revenues to liquidate the power construction costs. Obviously, if the net power revenues were to be set aside for a certain purpose, a separate bookkeeping account was required to effectuate this purpose.

(c) Mr. Hanna argues that it could not have been the intention to put a maximum limit on power construction costs because "a power

<sup>14</sup> File No. 5-1 (part 2), Indian Office—Flathead—Irrigation—General.

business is an ever-expanding thing that, for a long time to come, will require additional expenditures for extensions and enlargements." But the purpose of fixing a maximum limit is not necessarily intended to put a stop to further expansion. The purpose is rather to guard against such extensions without the consent of the districts. If, indeed, power construction is indefinitely extensible, there is all the more reason for fixing a maximum limit beyond which the project could not go without the consent of the districts. This same circumstance would also actuate the Government in insisting that the power costs be covered by a repayment contract. As a matter of fact, however, this argument also proves too much. Irrigation construction work can be expanded, too, although perhaps not to the same extent as power construction. Consequently, it would have to be concluded that irrigation construction costs were also not subject to the maximum limits fixed by the repayment contracts.

The intent of the statutes governing the Flathead irrigation project seems to be perfectly clear. But, even if they harbored some real ambiguity, I would be bound to resolve any doubt in favor of a construction of the repayment contract requirements that would be best calculated to protect the interest of the Government in the reimbursement of its expenditures. In the early history of the construction of Indian irrigation projects, construction work was authorized by Congress and undertaken without any adequate provisions to insure reimbursements of the Government. Even when funds were made reimbursable, questions were raised as to the liability of landowners for construction work that had been authorized, and repayments lagged and litigation resulted. The device was then adopted of requiring repayment contracts before any construction work could be undertaken. Thus a contract obligation was superimposed upon the statutory requirements upon which the Government could rely quite apart from statutory requirements, and which at the same time served to protect the landowners. This beneficent device should not be weakened by dubious constructions. It is my opinion, therefore, that it was the intent of the statutes governing the Flathead irrigation project to impose the repayment contract requirement with reference to power, as well as irrigation construction costs. If further construction work is to be undertaken, supplemental repayment contracts should be obtained to cover both power and irrigation construction costs, if both are undertaken.

FOWLER HARPER,  
*Solicitor.*

Approved:

OSCAR L. CHAPMAN,  
*Assistant Secretary.*

## H. P. SAUNDERS, JR.

A-23991

*Decided May 16, 1945***Oil and Gas Leases—Preference Right to New Lease Under Act of July 29, 1942—Time of Filing Application—Right of Assignee to Apply for New Lease.**

A letter applying for a preference right to a new lease under the act of July 29, 1942 (56 Stat. 726; 30 U. S. C. sec. 226b), which was received by the register on January 3, 1944, but allegedly mailed and postmarked on December 29, 1943, *held* not to have been filed on time in a case in which the old lease expired on December 31, 1943. Under the statute, the holder of a lease was given a preference right to a new lease "if he shall file an application therefor within ninety days prior to the date of the expiration of the lease." A paper is filed only at the time when actually delivered to and received by the office, not when it could have reached the office in the regular course of the mails. It is, therefore, immaterial whether or not there was unusual delay in the delivery of the letter.

**PETITION FOR THE EXERCISE OF SUPERVISORY AUTHORITY**

On December 31, 1938, a 5-year oil and gas lease, No. 029436, was issued to H. P. Saunders, Jr., pursuant to the amendatory act of August 21, 1935 (49 Stat. 674). The lease covered the following-described tracts of land:

T. 16 S., R. 31 E., N. M. P. M., New Mexico,

sec. 5, lots 1, 2, 3, 4, 5, 6, 7, 8, 9, 10, 11, 12, 13, 14, 15, 16,  
SW $\frac{1}{4}$ , N $\frac{1}{2}$ SE $\frac{1}{4}$ ;

sec. 6, all;

sec. 7, N $\frac{1}{2}$ , N $\frac{1}{2}$ S $\frac{1}{2}$ , SW $\frac{1}{4}$ SW $\frac{1}{4}$ , SE $\frac{1}{4}$ SE $\frac{1}{4}$ ;

sec. 8, NW $\frac{1}{4}$ , W $\frac{1}{2}$ SW $\frac{1}{4}$ .

Several partial assignments, covering 1,294.35 of the 2,533.98 acres of the lease, were submitted for approval during the year 1942. The Commissioner of the General Land Office, on June 29, 1943, held that the consideration stated in each of the assignments did not disclose the full consideration as required by Circular 1504 (43 Code of Federal Regulations 192.42d), and allowed the parties in interest 30 days in which to file affidavits showing the true consideration.

The lands involved are not within the known geologic structure of any producing oil or gas field, so that the term of the lease was not extended by statute but expired on December 31, 1943. (See act of December 22, 1943, 57 Stat. 608; 30 U. S. C. sec. 226b; see, also, 43 CFR 192.14e.) On January 3, 1944, a letter dated December 29, 1943, at Artesia, New Mexico, was received at the land office of Las Cruces, New Mexico, in which an informal application was made for the exercise of preference rights to a new lease under section 1 of the act

of July 29, 1942 (56 Stat. 726; 30 U. S. C. sec. 226b). This application, which was given No. 062521, embraces the part of the lease lands described as follows:

T. 16 S., R. 31 E., N. M. P. M., New Mexico,  
sec. 5, lots 1, 2, 11, 12, 13, 14, 15, 16,  $N\frac{1}{2}SE\frac{1}{4}$ ;  
sec. 6, lots 3, 4, 5, 6, 11, 12, 13, 14, 17, 18,  $E\frac{1}{2}SW\frac{1}{4}$ ;  
sec. 7, lots 1, 2, 3, 4 (or  $W\frac{1}{2}W\frac{1}{2}$ ),  $NE\frac{1}{4}SW\frac{1}{4}$ ,  $E\frac{1}{2}NW\frac{1}{4}$ ;  
sec. 8,  $NW\frac{1}{4}$ ,  $W\frac{1}{2}SW\frac{1}{4}$ ;  
containing 1,294.35 acres.

The same lands are embraced in an application filed by Pauline V. Trigg on January 1, 1944.

By letter of January 3, 1944, the register notified Saunders and the attorney of the assignees that the application was rejected for the reason that it was not filed within the period prescribed by the act; that it conflicts with other lease applications filed on January 1, 1944; and that additional filing fees and additional rental must be submitted. On January 24, 1944, Saunders filed a formal application and appealed from the decision of the register. In his decision of June 28, 1944, which was served upon Saunders on July 7, 1944, the Commissioner of the General Land Office affirmed the decision of the register. By letter of August 28, 1944, Saunders made a motion requesting the Secretary to exercise his supervisory power over the General Land Office and to grant a new lease for the tracts in question.

In support of the motion, Saunders contends, in substance, that the assignees had no knowledge that it was up to them to make application for a new lease covering their proportionate shares; that the informal applications of the assignees were mailed and postmarked at Artesia, New Mexico, on December 29, 1943, in ample time to have been received in Las Cruces before January 1, 1944, but that due to the negligence of the Post Office Department the applications were not received before January 3, 1944; and that the applicants should not be penalized because of the negligence of the post office and because of the failure of the Land Office to approve the assignments.

The applicants are not entitled to the preference right provided by section 1 of the act of July 29, 1942 (56 Stat. 726; 30 U. S. C. sec. 226b). That statute grants to the holder of the lease a preference right to a new lease "if he shall file an application therefor within ninety days prior to the date of the expiration of the lease." Clearly, the letter received by the register on January 3, 1944, does not meet that requirement because the date of its "filing" was January 3, 1944, i. e., after the expiration of the lease. "Filing, it must be observed, is not complete until the document is delivered and received. 'Shall

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file' means to deliver to the office and not send through the United States mails. \* \* \* A paper is filed when it is delivered to the proper official and by him received and filed." *United States v. Lombardo*, 241 U. S. 73, 76 (1916); *Poynor v. Commissioner of Internal Revenue*, 81 F. (2d) 521, 522 (C. C. A. 5th, 1936); *Weaver v. United States*, 72 F. (2d) 20, 21 (C. C. A. 4th, 1934); *Tyson v. United States*, 76 F. (2d) 533, 534 (C. C. A. 4th, 1935); *Wampler v. Snyder*, 66 F. (2d) 195, 196 (App. D. C., 1933); *Stebbins' Estate v. Helvering*, 74 App. D. C. 21, 121 F. (2d) 892, 894 (1941); *Creasy v. United States*, 4 F. Supp. 175, 177-178 (D. C. W. D. Va., 1933). Even if, as claimed by Saunders, the letter, in the usual course of the mails, should have reached the register at Las Cruces prior to the expiration of the lease, the fact nevertheless remains that the applications were not filed on time, for a paper is considered filed only at the time when it is actually delivered to and received by the office concerned, not when it could have reached that office in the regular course of the mails. *Poynor v. Commissioner of Internal Revenue*, *supra*; *Weaver v. United States*, *supra*.<sup>1</sup> It is thus immaterial whether or not there was any unusual delay in the delivery of the letter and whether or not the post office was "negligent." It is likewise irrelevant whether or not the assignees knew that they could apply for a new lease; nor does any significance attach to the fact that the assignments were not approved prior to the expiration of the original lease. The failure to file application for a new lease prior to the expiration of the original lease precludes the exercise of a preference right under the act of July 29, 1942.<sup>2</sup> (*Cf. Catherine Mon*, A. 23999, decided December 15, 1944, unreported.)

<sup>1</sup> See, also, the provision of 43 CFR 192.14d that applications for the exercise of a preference right under the act of July 29, 1942, must be submitted "in accordance with § 192.23." It is apparent from the rules of 43 CFR 192.23, concerning the required notation of the day and hour of filing in the district land office, that, in accordance with the general meaning of the term "filing," an application is considered filed only when received by the district land office.

<sup>2</sup> Saunders makes the general statement that at the time when prospecting permits were exchanged for leases there was also a requirement that the applications had to be filed with the district land office by a designated date, but that nevertheless leases were granted by the General Land Office on applications which had not been filed on time but which were shown to have been in the mail before the time within which they should have been filed. But this is not an accurate description of the act of August 21, 1935 (49 Stat. 674), under which such exchanges were made and to which Saunders presumably has reference. Under that act there was no requirement that an application be filed within a specified time (as under the act of July 29, 1942), but it was merely prescribed that prior to the termination of the permit the holder shall have the right to exchange the same for a lease. Such right is, of course, totally different in character from the preference right created by the act of July 29, 1942. No conflict with another lease application, as in the instant case, could have arisen at the time when exchanges of permits for leases could be made pursuant to the act of August 21, 1935, for upon expiration of a permit the land did not automatically become subject to applications for leases generally, but it became so subject only after affirmative action of the Secretary specifically opening the land. See, also, 43 CFR 192.11, 192.25.

The decision of the Commissioner of the General Land Office was correct and is affirmed.

OSCAR L. CHAPMAN,  
*Assistant Secretary.*

**JOHN LA RAY HUNT, JR. v. STATE OF UTAH**

A-24029

*Decided May 16, 1945*

**Application—Power-Site Withdrawal.**

The settled rules that no rights are acquired by an application if, when it is made, the land sought is not subject to appropriation, apply to applications for unrestored power-site lands.

**Application—Restoration from Power-Site Withdrawal.**

Application for restoration to entry or filing of land withdrawn for a power site confers no preference right on the applicant over others on restoration of the land.

**Application—Reinstatement.**

No right is initiated by a petition for reinstatement of an application filed at a time when the land was still under the spell of a withdrawal.

**Settlement—Small Site.**

Occupation and settlement on a lot prior to the filing of an application for a home and business site thereon under the act of June 1, 1938 (52 Stat. 609; 43 U. S. C. sec. 682a), create no right or equity in the applicant.

**APPEAL FROM THE GENERAL LAND OFFICE**

This is an appeal by John La Ray Hunt, Jr., from a decision of the Commissioner of the General Land Office dated October 28, 1944, which rejected his application, Salt Lake City 063050, filed February 21, 1941, under the act of June 1, 1938 (52 Stat. 609; 43 U. S. C. sec. 682a), for 4.99 acres in lot 2, sec. 7, T. 42 S., R. 19 E., S. L. M., for a home and business site.

The application was suspended because it erroneously described the land. It was held for rejection upon amendment because of incorrect description of the land. The description was corrected by further amendment filed June 23, 1941. In connection with his application, Hunt alleges that he has used the land for 2 years as an Indian trading post, merchandising place, and for his family residence, and had placed on the land a warehouse, dwelling, and other improvements worth \$3,000.

November 22, 1939, the State of Utah filed application 062809 to select, among other lands, lots 1 and 2 in sec. 7 above described. The selection was made under the grant of lands in the act of February

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20, 1929 (45 Stat. 1252), to the State for miners' hospitals. Said lots were included in Power Site Reserve No. 122, created July 2, 1910, and in Petroleum Reserve No. 7, created on the same date.

By decision of May 6, 1940, the Commissioner made final rejection of the selection of said lots. On June 27, 1940, the State, acting under section 7 of the Taylor Grazing Act, as amended, filed a petition for classification of the lots as suitable for its selection, and a petition for reconsideration of the decision of May 6 and for reinstatement of the selection of said lots, subject to the Federal Power Act and to reservation of oil and gas and other minerals to the United States. Further, it alleged that said lots lay along the San Juan River and had been used by Norman D. Nevills for many years in connection with his operation of a trading post and lodge and river-boat expeditions along the San Juan River, and that Nevills had applied to purchase said lots from the State.

On December 3, 1940, the Federal Power Commission, by the authority of and in accordance with section 24 of the Federal Power Act of June 10, 1920 (41 Stat. 1063), as amended by the act of August 26, 1935 (49 Stat. 803, 846; 16 U. S. C. sec. 818), made a determination that the value of said lots for the purpose of power development would not be injured or destroyed by location, entry, or selection under the public-land laws, subject to the provisions of section 24 of the Federal Power Act. Accordingly, by order of December 17, 1940, the Department opened said lots to disposition under the public-land laws, subject, however, to all existing valid rights, withdrawals, and the terms of said section 24. One of the withdrawals to which the land was subject was that of November 26, 1934 (Executive Order No. 6910), Solicitor's opinion, 55 I. D. 211. A second was that for Utah Grazing District No. 6 [June 22, 1935].

In view of the petition for reconsideration, the determination of the Federal Power Commission and the consent of the State to take subject to the reservations mentioned, the Commissioner, by decision of May 16, 1941, *reinstated* the State's application and recommended classification of the lots sought, together with certain other tracts embraced in the application. Upon departmental approval given on August 5, 1942, the Commissioner returned the application to the register for allowance and publication, and later received due proof of publication and of absence of protest down to January 1, 1943.

The Commissioner's decision of October 28, 1944, rejecting Hunt's application, recited the matters above set forth and concluded as follows:

In view of the foregoing, of the fact that the State's filing was first in point of time, and of the further fact that the possession of the land by Mr. Hunt since June 4, 1941, and by his predecessor prior to that date for business

purposes was unlawful, the small site application, Salt Lake 063050, is rejected. Applicant has a right of appeal. Should no appeal be filed, this decision will become final 30 days from notice hereof to applicant.

In his appeal therefrom, Hunt stated his willingness to amend his application to include all of lots 1 and 2, a total of 84.79 acres, and to take this land subject to the several reservations mentioned. He also contended that the Commissioner's course in the case of the State was erroneous, declaring as follows:

I believe that the State of Utah should have been required to file a new application to select this land after your decision of May 6, 1940, since the land was not open for disposition under the Public Land Laws at the time their application was filed, and that the application was at that time rejected by the General Land Office for that reason, in which case my filing would have been undoubtedly first in point of time.

Hunt's proposed enlargement of his application to include 84.79 acres, instead of only 4.99 acres, is not legally permissible, but his contention regarding the reinstatement of the State's application merits consideration. It is to be noted that according to well-settled rules no rights are acquired by an application if when it is made the land sought is not subject to appropriation: *Mouritsen v. Astle*, 44 L. D. 378 (1915); *Santa Fe Pacific R. R. Co. v. Ranklev*, 34 L. D. 380, 383 (1906); *Northern Pacific R. R. Co. v. Hunt*, 18 L. D. 163, 164 (1894); *Hall v. Stone*, 16 L. D. 199 (1893). Nor in the case of an appeal from a rejection based on that unavailability do any rights accrue to the appellant by reason of the restoration of the land to entry while the appeal pends. *Katharine Davis*, 30 L. D. 220, 221 (1900); *Falje v. Moe*, 28 L. D. 371, 373 (1899); *Reichert v. Northern Pacific Ry. Co.*, 44 L. D. 78 (1915); *Hendricks v. Damon*, 44 L. D. 205 (1915); *Harvey V. Craig*, 50 L. D. 202 (1923). These rules are elaborately discussed in *State of Arizona*, A. 18816, etc., decided October 16, 1935 (unreported).

There is no question that such rules apply to applications for lands in unrestored power-site reserves. Applications for restorations from such reserves, if favorably acted upon, will not give the applicant any preference right or right to preferential treatment (43 Code of Federal Regulations 103.5), and there is no way to acquire preference rights, preferential treatment, equitable or legal preference, unless legal or equitable rights have been acquired before withdrawal of the land (43 CFR 103.6).

In this case, Hunt's application of February 21, 1941, was filed after restoration of the lots on December 17, 1940, from the power-site withdrawal. On the other hand, the State's application for the lots was filed while they were in the withdrawal and not subject to appropriation. The State's application was, therefore, void and was properly rejected. Further, since no right was created by the application,



*May 16, 1945*

none would be preserved by a reinstatement. Nor could any right be initiated thereby, for the status of the land on June 27, 1940, when the petition for reinstatement was filed, would be determining, and at that time the land was still under the spell of the withdrawal and therefore not subject to appropriation.

It is clear, therefore, that to reinstate the application on May 16, 1941, in the presence of the prior adverse claim of Hunt was to accord preferential treatment to the State, and in effect through the doctrine of relation to confer on the State's void application the status of an application legally capable of giving rise to a right inceptive as of the time of the original filing or of the restoration of the lands to disposition. This was clearly contrary to established precedents and the several rules and regulations above noticed. The State is chargeable with knowledge of the law and the applicable regulations. The fact that by the erroneous action of the Commissioner it may have been induced to believe that its application has validity can be no justification for giving the State priority over Hunt.

It is possible, however, to treat the Commissioner's action in reinstating the application as a ruling that in the circumstances the filing of a new application would be an unnecessary formality, and that upon reinstatement the original application should be regarded as having effect only as of the time of such reinstatement and therefore as being subject to such rights as Hunt might be deemed to have acquired by his prior application. What those rights are appears from the applicable regulations under the Five-Acre-Tract Law. These provide, in part, as follows:

The filing of any application hereunder does not give the applicant the right to occupy, or settle upon, the land prior to the allowance of the application, but will segregate the land from other disposition under the public land laws subject to prior valid rights. [43 CFR, Cum. Supp., 257.8.]

Accordingly, Hunt acquired no rights or equities by his alleged occupation and settlement on the lot; and by his application he acquired only the right to have that application considered and adjudicated on its merits in conformity with established procedure. If the Land Office should find that lot 2, or the portion of it sought by Hunt, can be classified as a site for home or business; that Hunt is an eligible applicant and that he can meet the several conditions of the Five-Acre-Tract Law, the Commissioner could allow Hunt's application without regard for the State's prior application, since that gave the State no prior rights. However, since Hunt seeks such a limited portion of lot 2, only 4.99 out of 38.33 acres, the Commissioner might find it possible to make some adjustment between the parties whereby Hunt's substantial investment, so improvidently

made, might not be lost and the plans of Nevills, the State's prospective purchaser, might not be frustrated.

In consideration of all these premises, the Commissioner's decision is hereby modified to conform to the views above expressed, and the case is remanded for proceedings in harmony therewith.

OSCAR L. CHAPMAN,  
*Assistant Secretary.*

**AUTHORITY OF THE UNITED STATES TO PERMIT THE BURIAL  
OF AND ERECTION OF A MONUMENT FOR PRESIDENT ROOSE-  
VELT AND MRS. ROOSEVELT ON THE HOME OF FRANKLIN D.  
ROOSEVELT NATIONAL HISTORIC SITE**

**Life Estates—Power of Life Tenant to Create a Cemetery and Erect a  
Monument on Historic Site.**

Mrs. Roosevelt and her children as joint life tenants are the exclusive owners of the property of the "Home of Franklin D. Roosevelt National Historic Site," at Hyde Park, New York, and may create a cemetery and erect a monument with the consent of the Secretary of the Interior for the United States, as provided in the first covenant of the deed.

The cemetery and monument are also authorized by the Historic Sites Act of August 21, 1935 (49 Stat. 666).

M-34098

MAY 29, 1945.

**THE SECRETARY OF THE INTERIOR.**

MY DEAR MR. SECRETARY: You have presented for my opinion two questions that arise out of the burial of President Roosevelt on the property of the "Home of Franklin D. Roosevelt National Historic Site,"<sup>1</sup> at Hyde Park, New York, which was acquired by the Government on December 29, 1943:<sup>2</sup> First, whether the grave of President Roosevelt and Mrs. Roosevelt's right of interment are permissible and, secondly, whether the proposed monument may be erected.

There can be no doubt that the monument may be erected and that the remains of President Roosevelt and Mrs. Roosevelt may repose within the grounds.

The title to the site was acquired by the United States subject to the life estate of President Roosevelt and the joint life estate of Mrs. Roosevelt and her children. The life tenants are now the exclusive owners of the land with the exclusive right to its possession,

<sup>1</sup> So designated on January 15, 1944, 9 F. R. 977 (1944).

<sup>2</sup> Deed recorded in Office of the Clerk of Dutchess County at Poughkeepsie, New York, on December 31, 1943.

May 29, 1945

control, and enjoyment. The United States is the owner of the remainder but has no tangible physical ownership of the land at the present time. In the circumstances, and pursuant to the first covenant in the deed, the life tenants may make changes with the approval of the United States. The plans for the creation of the small cemetery to retain the remains of President Roosevelt and Mrs. Roosevelt upon her death and the erection of a monument are wholly consistent with the estate of the life tenants, and these improvements are also in harmony with the Historic Sites Act of August 21, 1935 (49 Stat. 666).

The deed to the property was delivered to the United States pursuant to Title III of the act of Congress approved July 18, 1939 (53 Stat. 1062, 1065), and the Historic Sites Act of August 21, 1935 (49 Stat. 666). Under the latter statute, it is expressly provided that the Secretary of the Interior shall have the power to "acquire in the name of the United States by gift, purchase, or otherwise any property, personal or real \* \* \*." The implicit objective of the statute would seem to sanction the use of a part of the garden for a cemetery, in accordance with the provisions of President Roosevelt's will. The interment of his mortal remains there will enhance the historical significance of the site for the inspiration and benefit of the people of the United States. The same act also provides that the Secretary may "Erect and maintain tablets to mark or commemorate historic or prehistoric places and events of national historical or archaeological significance." The monument to be erected in accordance with the plans of President Roosevelt is a tablet which marks an event of "historical significance." The simplicity and charm of President Roosevelt's instructions and specifications for this monument will add to the attractiveness and usefulness of the historic site—

That a plain white marble monument no carving or decoration be placed over the grave, east and west as follows:

Length 8 feet.

Width 4 feet.

Height 3 feet.

The whole to be set on a marble base extending 2 feet out beyond the monument all around, but said base not to be more than six inches above the ground.

It is my hope that my dear wife will on her death be buried there also, and that the monument contain no device or inscription except the following on the south side:

FRANKLIN DELANO ROOSEVELT

1882 - 19—

ANNA ELEANOR ROOSEVELT

1884 - 19—

Dated December 26, 1937.

Since Mrs. Roosevelt has been so intimately related to the life of her husband, she can hardly escape the "historical significance" in the lan-

guage of the Historic Sites Act which would make her also eligible for burial beside him.

FOWLER HARPER,  
*Solicitor.*

Approved:

HAROLD L. ICKES,  
*Secretary.*

### EXTENT OF AUTHORITY OF GOVERNOR OF PUERTO RICO IN EXERCISE OF POCKET VETO

**Governor of Puerto Rico—Executive Authority—Pocket Veto—Bill  
Amended by Legislature After Return by Governor with Objections—  
Organic Act of Puerto Rico.**

Under section 34 of the Organic Act of March 2, 1917 (39 Stat. 951, 960; 48 U. S. C. sec. 825), the Governor of Puerto Rico has authority to return to the Legislature with his objections a bill, originally disapproved by him, which thereafter was amended and passed by a two-thirds vote.

In the present case, the Governor may exercise the same power through the use of a pocket veto, since the Legislature meanwhile had adjourned at the end of a regular session.

M-34102

JUNE 11, 1945.

TO THE GOVERNOR OF PUERTO RICO.

Reference is made to your letter of May 28, addressed to the Under Secretary, in which you request my opinion as to whether, at the date the Legislature adjourned, you possessed authority to object by way of pocket veto to bill S. B. 4, entitled "The Reasonable Rents Act" or whether your only recourse is to transmit the bill to the President of the United States, as provided for in section 34 of the Organic Act of Puerto Rico, set out below.

It appears that bill S. B. 4 was originally passed in the first session of the Sixteenth Legislature on March 28. On April 13, you returned the bill with your objections. The bill was then amended, and on April 14 the Legislature passed it as amended by a vote of more than two-thirds of the members. The Legislature adjourned the next day, April 15.

In his letter of May 22, the Acting Attorney General of Puerto Rico expressed the opinion that you had exercised properly your authority to kill the bill by a pocket veto. He wrote:

Said S. B. 4 after being repassed by the Legislature was not the original bill returned by you on April 13, 1945, and reconsidered by the Legislature in contemplation of Section 34 of the Organic Act but an amended bill and therefore a different one the return of which was prevented by the adjournment of the Legislature on April 15, 1945. One of the imperative implications of Section 34

June 11, 1945

of the Organic Act is that the overriding by the Legislature of the Governor's veto to a bill be restricted to a vetoed measure considered as a unit without amendment or change of any kind.

In the light of the foregoing, it is my opinion that said S. B. 4 as amended was pocket vetoed by you and needs not be sent to the President for any further action.

I concur in this opinion of the Acting Attorney General on both points. I agree that you possessed authority to return the second bill with your objections. I agree also that this authority might be exercised through a pocket veto, since the adjournment of the Legislature occurred at the end of a session.

Section 34 of the Organic Act of March 2, 1917 (39 Stat. 951, 960; 48 U. S. C. sec. 825), provides:

No bill shall be considered or become a law unless referred to a committee, returned therefrom, and printed for the use of the members: *Provided*, That either house may by a majority vote discharge a committee from the consideration of a measure and bring it before the body for consideration.

\* \* \* No bill shall become a law until it be passed in each house by a majority yea-and-nay vote of all of the members belonging to such house and entered upon the journal and be approved by the governor within ten days thereafter. If when a bill that has been passed is presented to the governor for his signature he approves the same, he shall sign it; or if not, he shall return it, with his objections, to the house in which it originated, which house shall enter his objections at large on its journal and proceed to reconsider it. If, after such reconsideration, two-thirds of all the members of that house shall agree to pass *the same* it shall be sent, together with the objections, to the other house, by which it shall likewise be reconsidered, and if approved by two-thirds of all the members of that house it shall be sent to the governor, who, in case he shall then not approve, shall transmit the same to the President of the United States. \* \* \* [*Italics supplied.*]

The bill, which was voted upon by a more than two-thirds majority, was not *the same* as that to which you objected. Hence, your veto of the original bill was never overruled by a two-thirds majority and the vetoed bill remained dead. Consequently, the "amended" bill could no longer be treated as identical with the original bill. The fact that this "amended" bill was not introduced as a new bill, did not alter the fact that it constituted a new bill.

Strangely enough, the legal question involved here (which could also have arisen under the Constitution of the United States or that of many of the States) seems never to have been dealt with in any litigated case, either Federal or State, nor has it been discussed in any leading treatise<sup>1</sup> or article<sup>2</sup> on constitutional law. There is, however,

<sup>1</sup> See Watson, "The Constitution of the United States," vol. I, pp. 353-380 (1910); Willoughby, "The Constitutional Law of the United States," vol. II (2d ed.), sec. 387, pp. 657-662; C. K. Burdick, "The Law of the American Constitution," pp. 81-84. See, also, Berdahl, "The President's Veto of Private Bills," 52 Pol. Sci. Q. 505 (1937), in which the following statement appears:

"Students of American government have given surprisingly little attention to the presidential veto power. The textbooks contain only the most cursory examination of it,

a precedent for the conclusion that a bill amended after being vetoed is not identical with the original bill. According to Cannon's Precedents of the House of Representatives (1936), § 1114, pp. 185-186, *H. R. 16460* (the Army appropriation bill) was returned by the President of the United States with his objections. When on August 18, 1916, the President's message on the return of the bill was read, Mr. James Hay, of Virginia, moved that the message be referred to the Committee on Military Affairs. The motion was agreed to, and the Committee made no report thereon. Thus the old bill died in Committee. On August 22, on motion of Mr. Hay, the rules were suspended and the same bill, but with the provision objected to by the President omitted and carrying a new number, was passed as *H. R. 17498*. This treatment of *H. R. 16460*, after the exercise of the veto power by the President of the United States, shows that Congress did not consider the second bill, which was in fact an amended bill, as identical with the original bill. And this was so even though the only change was the striking of the matter objected to by the President.

The Constitution of Virginia<sup>3</sup> expressly provides that a bill which

the commentaries do little more than repeat the phraseology of the Constitution, and the one attempt at a comprehensive study was made nearly fifty years ago."

<sup>2</sup> On the veto power of the President, the following articles have appeared: E. C. Mason, "The Veto Power—Its Origin, Development and Function in the Government of the United States" (Harvard Historical Monographs, No. 1); Katherine A. Towle, "The Presidential Veto Since 1889," 31 *Am. Pol. Sci. Rev.* 51 (1937); Richard M. Boeckel, "The Veto Power of the President," in *Editorial Research Reports*, vol. II, No. 21 (December 16, 1932); Clarence A. Berdahl, "The President's Veto of Private Bills," 52 *Pol. Sci. Q.* 505 (1937); Barnett, "The Executive Control of the Legislature," 41 *Am. L. Rev.* 215, 384 (1907); H. A. Peterson, "Veto Power of Illinois Governor," 6 *John Marshall L. Q.* 277 (1940-41); G. R. Negley, "The Executive Veto in Illinois," 33 *Am. Pol. Sci. Rev.* 1049 (1939).

<sup>3</sup> The Constitution of Virginia, Article V, Section 76, provides:

"Every bill which shall have passed the senate and house of delegates shall, before it becomes a law, be presented to the governor. If he approve, he shall sign it; but, if not, he may return it with his objections to the house in which it originated, which shall enter the objections at large on its journal and proceed to reconsider the same. If, after such consideration, two-thirds of the members present, which two-thirds shall include a majority of the members elected to that house, shall agree to pass the bill, it shall be sent, together with the objections, to the other house, by which it shall likewise be reconsidered, and if approved by two-thirds of all the members present, which two-thirds shall include a majority of the members elected to that house, it shall become a law, notwithstanding the objections. The governor shall have the power to veto any particular item or items of an appropriation bill, but the veto shall not affect the item or items to which he does not object. The item or items objected to shall not take effect except in the manner heretofore provided in this section as to bills returned to the general assembly without his approval. If he approve the general purpose of any bill, but disapprove any part or parts thereof, he may return it, with recommendations for its amendment, to the house in which it originated, whereupon the same proceeding shall be had in both houses upon the bill and his recommendations in relation to its amendment as is above provided in relation to a bill which he shall have returned without his approval, and with his objections thereto; provided, that if after such reconsideration, both houses, by a vote of a majority of the members present in each, shall agree to amend the bill in accordance with his recommendation in relation thereto, or either house by such vote shall fail or refuse to so amend it, then, and in either case the bill shall be again sent to him, and he may act upon it as if it were then before him for the first time. \* \* \*

June 11, 1945

has been vetoed by the Governor and afterwards amended by the Legislature shall be considered as an original bill, so that the Governor may exercise his veto power again. This provision seems merely to clarify a status which, under the reasoning of this opinion, would have existed in the absence of such a provision.

Having reached the conclusion that under the Organic Act of Puerto Rico you possessed authority to object to the "amended" bill, a further legal question is presented as to whether you could exercise your veto power by a so-called pocket veto, that is, by omitting to sign the bill. Section 34 of the Organic Act of Puerto Rico (39 Stat. 951, 960; 48 U. S. C. sec. 825) provides:

\* \* \* If any bill shall not be returned by the governor within ten days (Sundays excepted) after it shall have been presented to him, it shall be a law in like manner as if he had signed it, unless the legislature by adjournment prevents its return, in which case it shall be a law if signed by the governor within thirty days after receipt by him; otherwise it shall not be a law. \* \* \*

According to this section, you had authority to pocket-veto the bill if the Legislature of Puerto Rico by its adjournment prevented you from returning the bill. It is well established in connection with a similar provision in the Constitution of the United States that an adjournment of Congress *at the end of a session* prevents the President of the United States from returning the bill, and consequently it will not become a law without his signature. *Pocket Veto Case (Okanogan Indians v. United States)*, 279 U. S. 655 (1929). Since, in your case, the Legislature adjourned at the end of a regular session on the final day permitted by statute (44 Stat. 1420; 48 U. S. C. sec. 817), your authority to pocket-veto the bill is clear.

For your guidance in the future, I might add that if the adjournment had occurred during a session of the Legislature, the legal situation would be more doubtful. In such a case the majority view seems to be that the President of the United States or the Governor of Puerto Rico is not prevented from returning the bill. *Wright v. United States*, 302 U. S. 583 (1938).<sup>4</sup> This view has been shared by the Supreme Court of Puerto Rico in *Pacheco v. Zequeira*, 27 P. R. R. 192 (1919), and in *Quebradillas v. Executive Secretary*, 27 P. R. R. 138 (1919).

A few courts have held that even a temporary recess of the Legislature prevents the executive from returning the bill. *In re Public Utility Board*, 83 N. J. L. 303, 84 Atl. 706 (1912); *People ex rel. Harless v. Hatch*, 33 Ill. 9 (1863); *State ex rel. Corbett v. South Norwalk*, 77 Conn. 257, 58 Atl. 759 (1904). See, also, 64 A. L. R. 1446, 1450. This minority view was adopted by the First Circuit Court of Appeals

<sup>4</sup> Numerous cases on the point appear in 82 L. ed. 454 *et seq.* (1938).

in *Porto Rico Telephone Co. v. People of Porto Rico*, 47 F. (2d) 484 (1931), in regard to section 34 of the Organic Act of Puerto Rico. In that case the First Circuit Court of Appeals relied on dicta of the Supreme Court of the United States in the *Pocket Veto Case*. However, as those dicta were discarded by the Supreme Court in the decision of *Wright v. United States*, the *Porto Rico Telephone Co.* case no longer seems to be good authority.

FOWLER HARPER,  
*Solicitor.*

### UNITED STATES CULTURAL-COOPERATION PROGRAM

United States Government-Sponsored Training Programs—Foreign Nationals—Not Employees of United States—Programs and Procedures  
(1) Department of State, (2) International Training Administration, Inc., (3) Department of the Interior.

Nationals of foreign governments received for training under programs sponsored by the Government of the United States are in no sense employees of that Government, and hence are not legally required to execute oaths of office or other papers common to appointment in the service of the United States.

There is ample legal authority for placement within the Interior Department of trainee nationals of other governments certified to it by either the Department of State or the International Training Administration, Inc.

The United States Cultural-Cooperation Program and regulations of the Department of State reviewed. The nature and scope of operations of the International Training Administration, Inc., reviewed.

M-34084

JUNE 19, 1945.

THE SECRETARY OF THE INTERIOR.

MY DEAR MR. SECRETARY: The Director of Personnel, by a memorandum of May 18, has requested my opinion on the legal basis for the placement of certain trainee nationals of foreign governments in the Department without requiring the execution of formal appointment papers. The memorandum transmitted certain informative material in connection with the program of the International Training Administration, Inc., which places young men from foreign nations with various agencies of the Federal Government and with private concerns for the purpose of receiving special types of training. The Director of Personnel states that heretofore the Interior Department from time to time has, with the approval of the Department of State, placed young men from friendly foreign nations assigned to it for training purposes and that in each instance the Department has issued an appointment without compensation and



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has required each trainee to execute the oath of office and other appointment papers usually required of new employees. The International Training Administration, Inc., questions the necessity for this procedure.

It is my opinion that these trainees are in no sense employees of the United States and that there is ample legal authority for their placement in the various bureaus of the Department without going through the processes required of formal appointees, such as the execution of oaths of office and appointment papers, whether the request to place them originates with the Department of State or with the International Training Administration, Inc.

The basic legal authority for the placement of all trainees derives from the various treaties, resolutions, declarations, and recommendations signed by participating governments, implemented by various statutory enactments of the Congress, Executive orders, and regulations issued pursuant thereto to further the program of the United States Government for cultural cooperation with other governments. Wartime exigencies have considerably expanded the program, with consequent complication of the authorizations and procedures. Since no coordinated review of the program as it affects the Department's personnel administration appears to have been made to date, it is believed desirable, at the risk of extending somewhat this opinion, to review its development chronologically, with particular emphasis upon that portion pertaining to the immediate problem of the Director of Personnel. Because of the increasingly prominent role of the International Training Administration, Inc., in the carrying out of the program, its activities also will be reviewed.

## I

On December 23, 1936, a "Convention for the Promotion of Inter-American Cultural Relations" was signed at Buenos Aires by the respective plenipotentiaries of the United States of America and the 20 other American Republics represented at the Inter-American Conference for the Maintenance of Peace held at that city. The convention provided for an "exchange of professors, teachers, and students among the American countries, as well as \* \* \* the encouragement of a closer relationship between unofficial organizations which exert an influence on the formation of public opinion \* \* \*." The convention was ratified by the President, on the advice of the Senate, July 15, 1937. It provides in pertinent part that every year each participating government shall award to two graduate students or teachers of each other country a fellowship for the ensuing scholastic year, which shall provide tuition and subsidiary expenses and main-

tenance at an institution of higher learning to be designated by the country awarding the fellowship, through such agency as may seem to it appropriate, with provision for traveling and other incidental expenses, and that each government agrees to encourage, by appropriate means, the interchange of students and teachers of institutions within its territory and those of the other contracting countries during the usual vacation periods (article I); outlines the procedure for the nomination, selection, and qualifying provisions for awarding the fellowships (article II); provides for repatriation for any reason at the expense of the nominating government (article III); requires a complete list of full professors available for exchange service from the outstanding universities, scientific institutions, and technical schools of each country, and the method of paying their expenses and salaries (article IV), etc.

By departmental order of July 27, 1938, there was created in the Department of State the Division of Cultural Cooperation (formerly known as the Division of Cultural Relations, and the Division of Science, Education, and Art), to have "general charge of official international activities of this Department with respect to cultural relations, embracing the exchange of professors, teachers, and students," etc. It further provided that "A primary function of the Division will be to serve as a clearing-house and coordinating agency for the activities of private agencies in the field of cultural relations. The efforts of the Division will have relation to nations in all parts of the world, but during the initial phase of its program, particular attention will be given to the other American Republics." In May 1938, pursuant to the direction of President Roosevelt, there was established by the Department of State the Interdepartmental Committee on Cooperation with the American Republics, now known as the Interdepartmental Committee on Cultural and Scientific Cooperation, composed of representatives of 13 departments and agencies, namely, the Departments of State, Treasury, Interior, Agriculture, Commerce, and Labor, and the Library of Congress, the Smithsonian Institution, the Federal Communications Commission, the United States Maritime Commission, the Export-Import Bank, the National Emergency Council, and the Civil Aeronautics Authority. There have been added the Departments of Justice, Navy, the Bureau of the Budget, the Federal Security Agency, the Federal Works Agency, the Foreign Economic Administration, National Archives, and the Office of the Coordinator of Inter-American Affairs. (United States Government Manual, 1945.) On November 10, 1938, the Committee submitted to the President a report embodying recommendations and a detailed program of cooperative projects. On April 7, 1939, the Secretary of State advised the President that "the recommendations in this report are in accord-

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ance with treaties, resolutions, declarations, and recommendations signed by all of the twenty-one American Republics at the Inter-American Conference for the Maintenance of Peace held at Buenos Aires, Argentina, in 1936, and at the Eighth International Conference of American States held at Lima, Peru, in 1938." On the basis of these actions there was drafted a bill which became the act of August 9, 1939 (53 Stat. 1290; 22 U. S. C. sec. 501). It provided, in part, as follows (section 1) :

That in order to render closer and more effective the relationship between the American republics the President of the United States is hereby authorized, subject to such appropriations as are made available for the purpose, to utilize the services of the departments, agencies, and independent establishments of the Government in carrying out the reciprocal undertakings and cooperative purposes enunciated in the treaties, resolutions, declarations, and recommendations signed by all of the twenty-one American republics at the Inter-American Conference for the Maintenance of Peace held at Buenos Aires, Argentina, in 1936, and at the Eighth International Conference of American States held at Lima, Peru, in 1938.<sup>1</sup>

All funds for carrying out the purposes of the above legislation are made available to the Department of State and are later allotted by that Department to the various other departments, agencies, and bureaus cooperating in the program. Prior to December 22, 1944, such appropriations had not provided for cooperative undertakings with other than the countries heretofore indicated. On that date, however, the Congress approved an act making appropriations to supply deficiencies and to provide supplemental appropriations for the fiscal years ending June 30, 1945, and June 30, 1946, and for other purposes, which expanded the operative field of the program by in-

<sup>1</sup> The act of June 24, 1938 (52 Stat. 1034), as amended by the act of July 14, 1941 (55 Stat. 589; 20 U. S. C. sec. 221), authorized the President by Executive order to provide for the instruction of citizens of the American republics, with or without charge, at professional educational institutions and schools maintained and administered by the Government of the United States or by departments or agencies thereof.

Related legislation comprising a part of the over-all cooperative program is the act of May 25, 1938 (52 Stat. 442; 5 U. S. C. sec. 118e), providing, in part, as follows:

"That the President of the United States be, and hereby is, authorized, whenever he finds that the public interest renders such a course advisable, upon agreement with the government of any other American Republic or the government of the Commonwealth of the Philippine Islands, or the Government of Liberia, if such government is desirous of obtaining the services of a person having special scientific or other technical or professional qualifications, \* \* \* to detail for temporary service of not exceeding one year, under such government any such person in the employ of the Government of the United States whose services can be spared: \* \* \*."

The act of May 3, 1939 (53 Stat. 652), amended this statute to provide for acceptance by the Government of the United States of funds offered in advance or as reimbursement for payment in whole or in part of the expenses of such details. Details of employees to countries not covered by the foregoing statutes are effected by special legislation. See, e. g., the act of June 29, 1940 (54 Stat. 691). The procedural details in connection with the statutes cited in this footnote were prescribed by the President, in Executive Order No. 9190, of July 2, 1942 (7 F. R. 5101).

cluding under Title I, Department of State, Foreign Service, International Obligations, among other items, the following:

Cultural relations with China and the neighboring countries and countries of the Near East and Africa: For all expenses, without regard to section 3709 of the Revised Statutes, necessary to enable the Secretary of State independently or in cooperation with other agencies of the Government to carry out a program of cultural relations with China and the neighboring countries and with countries of the Near East and Africa, fiscal year 1945, \$600,000 (payable from the appropriation "Emergency fund for the President," contained in the First Supplemental National Defense Appropriation Act, 1943, as supplemented and amended) \* \* \*. [58 Stat. 853, 870.]

On August 21, 1944, the Department of State issued Departmental Regulation 1 with respect to "Payments to and on Behalf of Participants in the Cultural-Cooperation Program," which superseded all previous regulations on the subject (9 F. R. 10243).<sup>2</sup> The regulations provide in pertinent part as follows:

§ 28.1 *Definitions.*—For the purpose of these regulations the following terms shall have the meanings here given:

(a) *Cultural-cooperation program of the Department of State.*—All programs in the field of international cultural relations and technical and cultural cooperation in connection with which payments are made direct by the Department of State, as well as similar program carried out by other Government departments and agencies and by private organizations with funds appropriated or allocated to the Department of State when these regulations apply under the provisions of § 28.2 (a) and (b) of this chapter. For convenience the cultural-cooperation program of the Department of State will sometimes hereinafter be referred to as the "program," and the Department of State will sometimes be referred to as the "Department."

(b) *Participants.*—Persons taking part in the program in one of the categories defined in paragraphs (c) and (d) of this section, including both citizens of the United States and of the other countries with which the program is carried on.

(c) *Leaders.*—Professors and instructors, persons of influence, and persons of outstanding accomplishment or possessing special qualifications in a professional, technical, cultural, or other specialized field, who may, however, independently or incidentally engage in research or study without thereby being necessarily classed as students as that term is hereinafter defined.

(d) *Students.*—Students, internes in public service and other technical and professional fields, trainees, holders of fellowships, and other persons engaged primarily in pursuing courses of formal study or guided research or training.

\* \* \* \* \*

§ 28.2 *Applicability of these regulations under special circumstances*—(a) *Funds administered by another department or agency.*—These regulations shall

<sup>2</sup> Previously, the Fish and Wildlife Service of the Interior Department had issued regulations governing fishery fellowships for students from the other American Republics, which were approved by the Secretary of the Interior on January 26, 1942, and the Secretary of State on March 5, 1942 (7 F. R. 2517). On December 30, 1944, the Director of the Fish and Wildlife Service, with similar approval by the Secretaries of the two Departments, rescinded those regulations and provided that thereafter the Fish and Wildlife Service would be governed by the Department of State regulations of August 21, 1944 (9 F. R. 10243). The Department of the Interior did not otherwise have formal regulations governing such matters.

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not apply to payments made to or on behalf of participants from funds appropriated or allocated to the Department of State and transferred by the Department to some other department, agency, or independent establishment of the Government by transfer appropriation warrant unless the terms of the transfer provide that such regulations shall apply in whole or in part or with such modifications as may be prescribed in each case to meet the exigencies of the particular situation.

(b) *Funds administered by an institution or facility.*—These regulations shall apply to payments made to or on behalf of participants from funds appropriated or allocated to the Department and administered by an institution, facility, or organization in accordance with the terms of a contract or grant made by the Department with or to such institution, facility, or organization, unless the terms of such contract or grant provide that these regulations are not to be considered applicable or that they are to be applied with such modifications as may be prescribed in each case to meet the exigencies of the particular situation.

(c) *Subsequent appropriations or allocations.*—These regulations shall apply to payments made by the Department of State with respect to appropriations or allocations which may hereafter be made to the Department for the program, so far as these regulations are not inconsistent therewith.

In my opinion there is nothing in any of the foregoing authorizations which suggests that the trainees brought to the United States thereunder are to be regarded in any way as employees of the Government. It accordingly is improper to issue to them "appointments" in the service of the United States and to require them to execute the usual oath of office and other forms incident to such appointment.<sup>3</sup> A representative of the State Department advises me that that Department is strongly of this view and that it discourages all unnecessary paper work in connection with the placement of such trainees, not only within, and immediately by, the State Department, but also by all other Government agencies when the fact of such practice comes to its attention.

The State Department regulations quoted above recognize that funds made available for the cooperative program may be administered by another department or agency (§ 28.2 (a)), or by an institution, facility, or organization in accordance with the terms of a contract or grant made by the State Department thereto (§ 28.2 (b)). If administered by a Government agency, the regulations are stated not to

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<sup>3</sup> Even where personnel may properly be regarded as being to a certain extent employees of the United States, such procedure is not required. On July 18, 1938, the Comptroller General advised the Secretary of State that personnel employed and paid from a joint fund to which contributions are made by more than one country, provided to carry out international agreements, treaties, etc., involving an undertaking common to more than one government of which the United States Government is only one, are not officers or employees of the "Government of the United States" within the meaning of the prohibition in the Appropriation Act for the Department of State for the fiscal year 1939 (52 Stat. 289); against the use of the funds appropriated thereby to pay "the compensation of any officer or employee of the Government of the United States" \* \* \* unless such officer or employee is a citizen of the United States." See 18 Comp. Gen. 59, 60 (1938); see, also, 6 *id.* 69; *ibid.*, 112, 113 (1926).

apply "unless the terms of the transfer provide that such regulations shall apply in whole or in part or with such modifications as may be prescribed in each case to meet the exigencies of the particular situation." If administered by a private agency, the regulations "shall apply \* \* \* unless the terms of such contract or grant provide that these regulations are not to be considered applicable or that they are to be applied with such modifications as may be prescribed in each case to meet the exigencies of the particular situation."

A representative of the International Training Administration, Inc., has advised that it clears with the State Department programs for the placement in the United States of trainee nationals of other countries. While the Department of the Interior, in an instance where funds appropriated or allocated to the Department of State and transferred by that Department to the Interior Department by transfer appropriation warrant not specifically providing that such regulations should apply in whole or in part, probably could establish additional procedural requirements for entrance of trainees placed under those funds into the Department, such procedure would be legally unnecessary and would appear to be wholly out of harmony with the general nature of the cooperative program to which the Department is committed.<sup>4</sup>

## II

The International Training Administration, Inc., is a private service agency which is officially recognized as playing a highly important part in the advancement of the international cooperation program referred to above. The nature and scope of its activities were well stated by the Acting Commissioner of Internal Revenue in a letter addressed to the Administration on September 22, 1944. After a

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<sup>4</sup>In addition to understandings and negotiations had directly with the Department of State, the Department of the Interior has indicated its recognition of the part being played by the International Training Administration, Inc., in advancing the cooperative program. On April 6, the Acting Secretary informed the President of the Administration that—

"The potential interest of agencies in the Department, other than the Bureau of Mines, in the activities of your organization has prompted Dr. Sayers, Director, Bureau of Mines, to bring to my attention your letter of March 8 relating specifically to the training program for Chinese technicians, which was the subject of an informal conference held in the office of Dr. Sayers on March 8.

"The proposal set forth in your letter with respect to cooperation of the Bureau of Mines in the form of placement within the Bureau, or facilitating suitable training in private industry, for approximately 150 qualified Chinese technicians has the approval of this Department. The Bureau of Mines is authorized to participate in the program involving Chinese technicians with the understanding that your proposal has the endorsement of the State Department, and that all expenses involved in connection with this project as a whole will be borne by the International Training Administration, Incorporated, or by some agency other than the Bureau of Mines."

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statement to the effect that in the opinion of that office "the services performed by the nationals of other countries while receiving training in the United States under the programs conducted by the International Training Administration, Inc., in the manner outlined above, do not constitute 'employment' as that term is defined in the Federal Insurance Contributions Act and the Federal Unemployment Tax Act," and that "Accordingly, the Federal employment taxes are not applicable with respect to such services," the Acting Commissioner stated:

\* \* \* the Inter-American Trade Scholarship was founded in August 1941 as a project of the Office of the Coordinator of Inter-American Affairs for the purpose of bringing young men from the other American republics to the United States for practical training and experience. The Inter-American Trade Scholarship proceeded to create the necessary machinery to select, supervise, provide orientation for, and place trainees with industry. For the selection of candidates a Trainee Selection Committee was established in each of the twenty other American republics. The committees work without compensation and are composed, in practically all instances, of a representative of United States industry in the respective country, the chairman of the Inter-American Development Commission of that country, and a representative of industry of the country. For the supervision throughout the tenure of the two-year awards, which includes the submission of regular activities reports and a final report for evaluation, staff and procedures were set up. For providing orientation in this country the cooperation of practically all governmental agencies was enlisted, as well as that of numerous private institutions. For placement with industry in the United States a Placement Advisory Committee was appointed. These steps were taken to insure the best possible training opportunities.

In 1942 the unit known as the Inter-American Trade Scholarship was redesignated the Inter-American Training Administration. In June 1943 the Inter-American Training Administration was made a division of the Inter-American Development Commission. As part of this international organization the Training Administration was able to make its operations more easily available to private industry and governmental agencies. In addition, under the Expanded Training Program, plans were being made that entities using the services of the Training Administration should pay both direct and administrative costs involved, which prior to such time had been borne by the Coordinator of Inter-American Affairs. Arrangements were made, with the approval and cooperation of the Inter-American Development Commission and the Coordinator of Inter-American Affairs, for the conversion of the Training Administration, its funds, activities, and personnel into a private, nonprofit, membership corporation, chartered in the State of Delaware under the name of International Training Administration, Inc. The certificate of incorporation was filed on June 19, 1944.

As a private institution, the International Training Administration, Inc., is servicing training programs involving not only nationals of countries in the Western Hemisphere, but also nationals of all other countries. The Coordinator of Inter-American Affairs has advised that the Extended Training Program, as well as other training programs of his office, is now being serviced by the International Training Administration, Inc., and that the corporation will continue without breach the servicing, handling, and carrying out of training programs which it was handling under the name of the Inter-American Train-

ing Administration. It appears that the programs serviced by the corporation are conducted in substantially the same manner as the program, outlined above, of the Inter-American Trade Scholarship and of the Inter-American Training Administration prior to incorporation.

\* \* \* \* \*

The General Counsel for the Administration has submitted a contract, dated January 19, 1945, entered into between the Treasury Department, acting as agent for the Foreign Economic Administration, and the International Training Administration, Inc., as a typical example of the nature of contractual agreements entered into between the Government and the Administration for its services.<sup>5</sup> As further evidence of the official recognition of the nature of the Administration, as well as the status of the trainees sought to be placed by it, the General Counsel also supplied a letter of July 26, 1944, from the Deputy Commissioner of Internal Revenue, Treasury Department, advising that the Administration is exempted from Federal income tax; a letter of August 10, 1944, from the Acting General Counsel of the War Manpower Commission, advising that in the opinion of the Commission the relationship established between the recipient of a training scholarship under the Administration's program and the Government agencies or private industrial concerns from whom he is receiving his training does not constitute an employment relationship within the meaning of War Manpower Commission regulations and employment stabilization programs, and that payments made to such trainees are considered to be in the nature of scholarships rather than wages, such services as are performed by the trainees being merely incidental to their training; a letter of January 4, 1945, from the Commissioner of Internal Revenue, to the effect that amounts paid by private industrial organizations in the United States to nationals of other countries while receiving training in the United States under the programs conducted by the Administration "do not constitute compensation for labor or personal services performed in the United States within the meaning of section 119 (a) (3) of the Internal Revenue Code, and are, therefore, not subject to the Federal income tax.

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<sup>5</sup> Pursuant to a conference reported held May 10, 1945, among representatives of the Foreign Economic Administration, the International Training Administration, Inc., and the Bureau of Reclamation, at which time it was indicated that the Interior Department wished to receive written assurance from the Department of State that assistance afforded to the Chinese trainees to be placed under this contract with the International Training Administration, Inc., would be to the interest of the United States Government, the Acting Secretary of State made the following statement in a letter to the Secretary of the Interior on May 30:

"The Department of State has examined the contract just described and concurs in the view therein expressed that its execution will further the prosecution of the war, and finds that this program for the training of 1,200 Chinese citizens, which is to be administered by the International Training Administration, Inc., under present conditions, will be in the interest of the United States Government. Accordingly, the Department of State will appreciate assistance by the Department of the Interior in appropriate placement of qualified Chinese technicians."

\* \* \* \* \*



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The amounts paid to the trainees under the circumstances involved in the programs conducted under the auspices of the International Training Administration, Inc., are considered as in the nature of scholarships, rather than compensation for services"; a letter of January 5, 1945, from the Assistant Commissioner, Immigration and Naturalization Service, outlining the procedures to be followed with respect to aliens entering the United States to participate in industrial training programs under the auspices of the Administration; a letter of February 1, from the Deputy Commissioner of Internal Revenue, holding that the amounts paid by industrial concerns to the trainees under the programs of the Administration "constitute ordinary and necessary expenditures directly connected with or pertaining to the trade or business of such industrial concerns and are, therefore, business expenses deductible from gross income on their Federal income tax returns"; a letter of February 1, from the Acting Director, Foreign Funds Control, Treasury Department, advising that the Department had authorized the Collector of Customs at San Pedro, California, and would authorize Collectors of Customs at all ports of entry throughout the United States, to permit each Chinese student trainee entering the United States under the supervision and jurisdiction of the Administration to retain United States currency of an aggregate value not exceeding \$300, and that the Department would be "pleased to give separate consideration to a relaxation of the currency import requirements in connection with nationals of other countries who may enter the United States in the future under your student training program."

In a letter of April 18 to the President of the Administration, Secretary of State Stettinius commented as follows:

Your organization has contributed much to good international understanding, and it is hoped that your efforts toward that admirable goal may be successfully continued. In the past, the training-in-industry programs of the International Training Administration have assuredly been in the national interest, and its continued collaboration with governmental agencies through appropriate channels is cordially recommended.

Many of the functions of your organization have no doubt become routine, and the Department assumes that they will be carried on in accordance with established procedures. The Department quite naturally continues to wish to be informed well in advance of programs which may involve understandings with other governments or foreign entities such as those now under way or being considered by you in connection with the eight governments mentioned in your letter in reference. To form a judgment in regard to any proposed training program, the Department will require detailed information, including the method by which the trainees will be selected and supervised, the places where the training will be given so far as this can be determined in advance, the status of trainees at the time of selection and the occupations for which they are being

trained, the source from which the program is to be financed and the contemplated length of the training period, together with other data the need for which may arise.

The Division of Cultural Cooperation is correctly named by you as the logical point of clearance for matters pertaining to training in industry. As in the past, it will continue to clear your programs within the Department and with Selective Service. In the Division, the Secretariat of the Interdepartmental Committee on Cultural and Scientific Cooperation should be your initial point of contact with all government agencies both for transmitting information and for receiving assistance in questions relating to your program where international commitments or negotiations are involved.

Be assured that every care will be afforded toward assisting to maintain your splendid record of achievement.

Since the trainees presently sought to be placed by the International Training Administration, Inc., in connection with Government-sponsored programs may be regarded, so far as placement in the Department is concerned, as already having been cleared in the same manner as trainees placed directly by the Department of State, there accordingly is no legal necessity for their being required to execute any additional papers in the nature of appointments upon entering the Department. Placement of trainees in Government establishments under privately sponsored programs may present further questions which it is deemed unnecessary to anticipate here, inasmuch as all of the trainees presently sought to be placed appear to be connected with the expanding Government-sponsored programs.

#### CONCLUSION

Answering specifically the points raised in the memorandum from the Director of Personnel, I accordingly conclude that under the authorities reviewed above (1) nationals of foreign governments received for training under programs sponsored by the Government of the United States are in no sense employees of that Government, and hence are not legally required to execute oaths of office or other papers common to appointment in the service of the United States; and (2) that there is ample legal authority for placement within the Department of such trainee nationals of other governments certified to it by either the Department of State or the International Training Administration, Inc.

FOWLER HARPER,  
*Solicitor.*

Approved:

HAROLD L. ICKES,  
*Secretary.*

## MARK J. DAVIS, JR.

A-23995

*Decided June 20, 1945**Motion for Rehearing Decided September 18, 1945***Mineral Leasing Act—Regulations—Known Geologic Structure—Definition and Redefinition by Geological Survey.**

Under regulations of the Department (43 CFR 192.3) the Geological Survey performs the Secretary's function of determining the boundaries of the structure of an oil or gas field within the meaning of section 32 of the Mineral Leasing Act (30 U. S. C. sec. 189), and an inadvertent listing of land for noncompetitive lease by the Commissioner or any employee of the Land Office is ineffectual to modify the Survey's determination. Redefinitions by the Survey are prepared formally and copies, together with new maps or diagrams, forwarded to the Commissioner for distribution to proper local land offices.

**Mineral Leasing Act—Secretary's Authority to Lease Known Oil Lands Only by Competitive Bid.**

Section 17 of the Mineral Leasing Act, as amended (30 U. S. C. sec. 226), authorizes the Secretary, in his discretion, to lease lands known or believed to contain oil or gas only by competitive bid; hence a notification to an applicant that he has been successful in a drawing among applicants for known oil lands inadvertently listed for noncompetitive bid confers no right upon him, and he cannot be heard to complain that the "lease" which he does not have must be canceled by court action in accordance with the last sentence of section 17.

**Mineral Leasing Act—Effect of Notice of Availability of Lands for Lease.**

Nothing in the Mineral Leasing Act of February 25, 1920, as amended (30 U. S. C. sec. 181 *et seq.*), or its numerous administrative and judicial interpretations, indicates that a notice posted by the Land Office concerning the availability of lands for oil or gas lease constitutes an irrevocable offer of the lands or creates any rights in those who may respond.

**Mineral Leasing Act—Definition of Structure.**

The fact that the land at the time of application is within the known producing structure of an oil and gas field, and not the fact whether notice of designation has been given thereof by the filing of maps and diagrams in the local office, as prescribed by the oil and gas regulations (43 CFR 192.3), determines the allowability of the application.

**Mineral Leasing Act—Rights to Noncompetitive Lease.**

No rights are initiated or conferred upon a successful applicant for the land at a drawing for a noncompetitive lease where the offering was without authority. Notice to such applicant of the subsequent offer of the land to competitive bidding is not therefore necessary.

**APPEAL FROM THE GENERAL LAND OFFICE**

Mark J. Davis, Jr., appeals from the Commissioner's decision of August 5, 1944, rejecting his oil and gas lease application, Buffalo 038561, filed April 11, 1944, with respect to that portion of the land

within the known geologic structure of the Lamb Anticline field as defined March 12, 1925.

Certain Wyoming lands became available for lease on April 12, 1944, due to the final cancellation of oil and gas permits covering them, and a notice to that effect was posted in the district land office. Appellant's application was one of a number considered as filed simultaneously in response to that notice, and as a result of the subsequent drawing Davis was informed he was first as to all lands for which he had applied. However, the lands listed as available for noncompetitive leasing erroneously included certain lots which, while subject to permit since 1922, had since 1925 been within the known geologic structure of the Lamb Anticline field.<sup>1</sup> They were again listed in a notice of sale by competitive bid set for August 7, 1944, under section 17 of the Mineral Leasing Act, as amended by the act of August 21, 1935 (49 Stat. 674; 30 U. S. C. sec. 226). On July 25, 1944, Davis filed a protest to the offering of said lands for sale. By decision of August 5, 1944, the Commissioner dismissed that protest and held that Davis was entitled to noncompetitive leases to the balance of the lands. From that decision Davis appeals on the grounds—

1. That the Commissioner's authorization to the register to list expiring permits and make notations on the records of his office that the lands were open to noncompetitive lease in effect modified the 1925 definition of the Lamb Anticline field, and when the Commissioner subsequently approved the advertisement of the same land for competitive bid, he was making a retroactive decision.

2. That applicant's rights became vested when he was notified that he was the No. 1 applicant to the lands for which he had applied, and that in accordance with 30 U. S. C. sec. 226 his "lease" as to that portion of the land containing known deposits was cancellable only by court action.

3. That the case of *Wann v. Iokes*, 92 F. (2d) 215 (1937), cited by the Commissioner, is distinguishable, since Wann was not "invited" to apply for the lands there involved.

1. Appellant attempts to base some right on the inadvertent listing for noncompetitive lease of the lands in controversy. Section 32 of the Mineral Leasing Act (act of February 25, 1920, 41 Stat. 437, 450; 30 U. S. C. sec. 189), authorizes the Secretary "to fix and determine the boundary lines of any structure, or oil or gas field" for the purposes of the act. Administratively, the Geological Survey performs this function of the Secretary. Section 192.3, 43 Code of Federal Regulations, provides that the Survey shall define the boundaries of the geological structure of a producing oil or gas field and that maps or diagrams showing these boundaries shall be placed on file in the district land offices. No inadvertent action by the Commissioner or any employee of the Land Office is effectual to modify the Survey's deter-

<sup>1</sup> See Buffalo 019322, oil and gas prospecting permit issued to Margaret Prescott July 14, 1922, and canceled April 12, 1944, after the matter of issuing exchange leases dated as of December 31, 1938, had been closed.

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mination. When the boundaries of a structure are modified, the Survey prepares a formal redefinition of the structure with a new map or diagram, and forwards copies to the Commissioner for distribution to the proper local land offices. This degree of formality practically precludes bona fide reliance upon clerical errors or oversights by the General Land Office with reference to the known oil character of public lands.

2. Appellant could acquire no vested right to the "known" lands by virtue of the notification that he was successful at the drawing, since the Secretary is without authority under the statute to lease such lands except by competitive bid (section 17 of the act of February 25, 1920, as amended; 30 U. S. C. sec. 226). *George C. Vournas*, 56 I. D. 390, 394 (1938). The last sentence of section 17 refers to the cancellation of certain *leases* by court action. Appellant, of course, has no lease, and, as we have stated, there is no authority in law for the issuance to him of a lease to the lands in controversy.

3. It is not apparent how the posted notice "inviting" applications distinguishes this case from the holding in *Wann v. Ickes*, *supra*, in which no notice of availability was given. That case held that the Secretary's definition of an oil structure, based on information known at the time the application was filed but actually made after filing, denied to applicant no rights and was binding upon the courts. Also, the Court of Appeals for the District of Columbia pointed out (p. 217)—what has frequently been held—that leases under the act are permissive with the Secretary. *Delbert Eugene Foreman*, A. 23985, January 31, 1945; *Carlton Beal*, A. 23731, January 17, 1944 (unreported), and authorities there cited. Nothing in the Mineral Leasing Act or the many decisions construing it supports the proposition that a posted notice concerning the availability of certain lands for lease constitutes an irrevocable offer of the lands, or creates any rights in those who may respond.

The decision of the Commissioner is affirmed.

OSCAR L. CHAPMAN,  
*Assistant Secretary.*

#### MOTION FOR REHEARING

Departmental decision of June 20, 1945, affirmed the rejection of the application, Buffalo 038561, of Mark J. Davis, Jr., for a noncompetitive oil and gas lease to the extent of certain lots which had, since March 12, 1925, been within the known structure of the Lamb Anticline field as defined by the Geological Survey.

These lots had been inadvertently included by the Commissioner of the General Land Office in a list of lands available for noncompeti-

tive leases in April 1944, and as a result of a drawing between simultaneous applicants, Davis, whose application embraced the lots, was notified that he drew No. 1 as to all the lands for which he had applied. In view of the fact that the said lots were within the known structure of the Lamb Anticline gas field, they were among those listed, under section 17 of the Mineral Leasing Act, as amended (30 U. S. C. sec. 226), in a notice of sale by competitive bid, and the sale set for August 7, 1944. Against this listing Davis filed a protest which the Commissioner dismissed.

In affirmance, the Department ruled adversely on the applicant's contention that his rights to a lease became vested when notified he was the successful drawer. It was held, in substance, that no inadvertent action of the Commissioner is effectual to modify the Survey's determination; that 43 Code of Federal Regulations 192.3, providing for the definition of the boundaries of geologic structures of a producing oil and gas field and that maps and diagrams showing such boundaries be filed in the local offices, precluded bona fide reliance upon clerical errors and oversights in the General Land Office as to known oil character of public land; that the Secretary had no authority to lease the lands in question except by competitive bidding; that the granting of leases under the act is permissive with the Secretary; that a posted notice concerning the availability of certain land for lease does not constitute an irrevocable offer or create any rights in those who may respond.

Davis has filed a motion for rehearing. He contends that—

#### I

The determination of the boundary lines of the Lamb Anticline was not a completed act until August 21, 1944.

#### II

Applicant has a right to disprove the determination of the boundary classifying the Lamb Anticline as a producing oil and gas field.

In support of the first contention it is stated:

\* \* \* It was not until August 21, 1944, that a map or diagram was placed on file in the District Land Office and not until then was there a complete definition of the Lamb Anticline.

The purpose and effect of the regulation 43 CFR 192.3 were mentioned in the decision. The Department has held (*George Goff*, A. 24000, May 28, 1945) that—

The fact that the land at the time of application is within the known producing structure of an oil and gas field, and not the fact whether notice of designation has been given thereof by the filing of maps and diagrams in the local office, as prescribed by the oil and gas regulations (43 Code Federal Regulations 192.3), determines the allowability of the application.

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There is no good reason or authority for the proposition asserted by the movant that the filing of the diagram of a structure in the local office, as prescribed in the afore-mentioned regulation, is as essential to the effectiveness of a definition thereof as the filing of a plat of survey of public lands in the local office is essential to the effectiveness of a survey. There is nothing in the regulation that implies that the designation becomes effective only upon filing thereof.

As to the complaint that the land was offered for competitive bids without notice to the applicant, as the offering for noncompetitive lease and subsequent drawing was without authority, movant initiated no rights in the land, and none were conferred. The rules as to the necessity of previous notice to cancel *entries* or other filings where valid rights are obtained are not applicable. The movant was duly notified of the *pro tanto* rejection of his application and the reason therefor.

As to the second contention, the movant relies upon the principles applied in *Arthur K. Lee et al.*, 51 L. D. 119 (1925); *John McFayden et al.*, 51 L. D. 436 (1926); *Ohio Oil Co. et al. v. W. F. Kissinger, Yale Oil Corp.*, 58 L. D. 753 (1944).

These cases are not applicable. They dealt with the question of the rights under mining locations to lands classified as coal lands. The principle was there enunciated that the mere classification of land as coal land does not bar location of the land under the mining law for nonmetallic minerals unless the land in fact possess value for coal, and that a mineral claimant is entitled to an opportunity to show that such classification was erroneous. On the other hand, the determination of the boundaries of structures of producing oil and gas fields is a matter which was specifically entrusted to the Secretary (section 32 of the Mineral Leasing Act of February 25, 1920, 41 Stat. 437, 450; 30 U. S. C. sec. 189; see, also, 43 CFR 192.3), and the issuance of leases under the Mineral Leasing Act is permissive with the Secretary.

There is nothing in the motion that warrants any change in the decision. The motion is therefore denied.

OSCAR L. CHAPMAN,  
*Assistant Secretary.*

RAYMOND L. PALM

A-23801

*Decided June 30, 1945*

#### Second Homestead Entry—Volstead Drainage Act—Withdrawals.

Where an applicant for a second homestead entry on land subject to the Volstead Drainage Act but withdrawn from homestead entry meets all the statutory requirements for making a Volstead entry and securing a Volstead

patent, he has a right and the State in which the land is situated has a right to demand the issuance of a Volstead patent to the applicant.

#### APPEAL FROM THE GENERAL LAND OFFICE

Raymond L. Palm, of Wannaska, Minnesota, has appealed informally from the decision of the Acting Assistant Commissioner of the General Land Office made on November 26, 1943, rejecting Palm's application, G. L. O. 08365, for second homestead entry of certain Red Lake ceded lands situate in Roseau County and described as follows: T. 159 N., R. 40 W., 5th P. M., Minnesota, sec. 27, NE $\frac{1}{4}$ SE $\frac{1}{4}$ , and lot 3; 91.09 acres.

The decision pointed out that these lands were ceded lands of the Red Lake Indian Reservation, appraised at \$1.25 per acre, and that on September 19, 1934, they had been withdrawn from entry by order of the Secretary of the Interior pending their permanent restoration to tribal ownership under section 3 of the Indian Reorganization Act of June 18, 1934 (48 Stat. 984; 25 U. S. C. sec. 463), subject, however, to existing valid rights.

The decision also explained that on May 12, 1919, these lands had been "sold" by the State of Minnesota for drainage charges in pursuance of the Volstead Act of May 20, 1908 (35 Stat. 169; 43 U. S. C. sec. 1023); that on October 27, 1941, the auditor of Roseau County had reported that as of that date back drainage charges amounted to \$494.96 and that if these were not paid by December 1, 1941, a penalty of 10 percent was to be added; and that after said December 1st, the total of \$544.46 would have to be paid before entry of the lands could be allowed (43 Code of Federal Regulations 118.25a).

The decision further stated that at Palm's request Land Office action on his application had been suspended in order that applicant might try to obtain from the county board some adjustment of the drainage tax due; and that on August 5, 1942, the Roseau County auditor had reported that there were then no tax liens existing against the lands. The Land Office decision provided its own explanation of this absence of liens by saying in paragraph 4:

\* \* \* This information was based on the erroneous entries on the County books to the effect that lands assessed or sold for drainage charges under the act of May 20, 1908, have been forfeited to the State for nonpayment of drainage taxes and by such forfeiture have been cleared of liens. The ceded Indian lands cannot be forfeited to the State and the liens arising under the Volstead Act of May 20, 1908, still exist. [Italics supplied.]

The 5th and 6th paragraphs of the decision, here numbered for convenience in reference, were in part as follows:



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5. "The Department held on August 12, 1942, that such lands [lien-burdened lands] were no longer subject to homestead entry but that they may be entered under the Volstead Act."<sup>1</sup>

6. "In view thereof, the homestead application is rejected. \* \* \*

Palm immediately filed an informal appeal. In part, this was as follows:

\* \* \* I feel I have done everything you say I needed to have entry allowed \* \* \*. I understood that if I took care of all drainage charges \* \* \* application would be allowed.

I took it up with the County board and got adjustment on drainage taxes, and sent you a notice to that effect, that there were no longer any tax liens against land described in my application.

When I got your decision of Nov. 26, I went into the County seat to again ascertain that there were no taxes left against said land, and got certificates filled out and executed by the County officers at Court house. \* \* \* I am sending herewith these Certificates, by the County Auditor, and Register of Deeds, and hope this is the information you need to allow my entry.

I have done my best the best I know how, and know you have done and will do the same, so hope this will clear this case up.

With this appeal, Palm sent a certificate from the county auditor entitled "Certificate Releasing Ditch Liens." Numbered 103760, this was executed December 10, 1943, and reads as follows:

I, O. A. Brager, Auditor of said County, do hereby certify that full payment has been made of the amount heretofore levied by the County of Roseau to pay the expense of the construction of Judicial Ditch No. 63 upon the following described lands situate in said County, to wit: NE $\frac{1}{4}$ SE $\frac{1}{4}$ , and Lot 3 of Section 27, Township 159 N. of Range 40 W.

THEREFORE, in consideration of the payment in full of said assessments, I, O. A. Brager, do hereby release the said lands from the lien of said assessment recorded in Book 118 of Miscellaneous at Page 312-322 and the Register of Deeds of said County is authorized and required to discharge the same of record.

On the back of this certificate was an endorsement by the register of deeds that the certificate had been filed for record in his office on December 10, 1943, and was duly recorded in Book 187 of Satisfactions, on page 623.

As the Commissioner's decision pointed out, the lands sought by Palm are among the many thousands of acres of United States lands in Minnesota, both public and ceded Indian lands, entered and unentered, which became affected by the Volstead Drainage Act of May 20, 1908, and the disposal of which became dependent in large part upon the proceedings had under the authority of that act. Concerning these tracts, therefore, the sole question here involved is whether in the circumstances of this case there have arisen under the Volstead Act any rights which, despite the departmental withdrawal

<sup>1</sup> Solicitor's opinion, August 12, 1942, 58 I. D. 65.

above mentioned, would except the tracts from the withdrawal and require the United States to issue a patent to Palm.

The answer to this question calls for consideration of the terms of the Volstead Act in relation to the facts of this case. The Commissioner's decision, however, neither states the question nor discusses the act. Referring to the lien-burdened lands, it merely says:

The Department held on August 12, 1942, that such lands were no longer subject to homestead entry but that they may be entered under the Volstead Act.

And then without explaining the holding, it rejects Palm's application as being for homestead entry of lien-burdened lands. The Department finds that in thus deciding the Commissioner failed to give consideration to all the rights arising in this case by virtue of the Volstead Act, a fact which will appear from the following review of this controlling law, as interpreted by the Department on August 12, 1942, in the Solicitor's opinion of that date (footnote 1, *supra*).

The Volstead Act of May 20, 1908, was passed at the instance of Minnesota Representatives in the Congress. For some years the Minnesota delegation had been trying to persuade the Congress to parallel the statute for Federal reclamation of arid lands by irrigation<sup>2</sup> with a statute for Federal reclamation of wet lands by drainage. They were unsuccessful, however, and when in April 1908 the Flint bill<sup>3</sup> for Federal drainage failed of passage, they offered a bill applicable to Minnesota alone and permitting Minnesota to reclaim under its own law the wet United States lands in that State. The Volstead Act resulted. It is a "reference" statute, adopting, by general reference only, the compatible portions of Minnesota law in the fields of drainage and taxation. Because of awkward drafting and the general terms of this adoption feature, it has been one of the most involved and least understood laws on the Federal statute books<sup>4</sup> and has brought about the very confusion as to the two sovereignties predicted in debate by its congressional opponents.

The purpose of the act was to enable the State of Minnesota to make available for agriculture the extensive areas of unutilized, marshy land belonging to the United States in northern Minnesota, to promote their settlement by responsible farmers, and to bring the resulting farms into the revenue-producing structure of the State. For this purpose the act authorized the State of Minnesota to drain the United States lands under those State laws which related to the drainage of swamp and overflowed lands for agricultural purposes.

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<sup>2</sup> Act of June 17, 1902 (32 Stat. 388).

<sup>3</sup> S. 4855, 60th Cong., 1st sess., introduced February 3, 1908, by Senator Flint. See, also, H. R. 16007, 59th Cong., 1st sess., introduced March 1, 1906, by Representative Steenerson.

<sup>4</sup> See Annual Report for 1915 by the Commissioner of the General Land Office, pp. 32-33.

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For the costs of such drainage operations the act expressly declined to place any responsibility upon the United States; but in order to assist the State, it provided a workable legal system, based on the State's tax collection law, through the operation of which, entirely independently of the United States Treasury, the State might hope to be reimbursed for its drainage expenditures. To this end the act authorized the State to assess the drained lands, to impose liens thereon, and to collect the charges due or to enforce them by State tax sales.

These acts were all to be performed in compliance with specific terms of the Volstead Act and with such compatible parts of Minnesota's then existing drainage and tax laws as the Volstead Act by general reference adopted. In the case of entered lands, the liens were to be collected from the homestead entryman, as if he were a private owner. In the case of unentered lands or of entered lands becoming delinquent, the procedure was to be that of trying to find through tax sales someone who would pay the charges. The delinquent lands were to be offered at public tax sale and sold to any qualified purchaser willing to satisfy the liens and pay the purchase price of the lands to the Federal Government, together with its fees and commissions. If no such purchasers appeared at the public sale, the State was to "bid in" the lands and hold them in the hope that some purchaser would appear to satisfy the liens at private sale by the State.

This procedure of "bidding in," or "sale," of the Government lands to the State did not mean that an actual sale occurred and that title passed to the State. The State tax law in force in 1908, which under the rules concerning Federal reference statutes was the only tax law adopted, subsequent amendments notwithstanding, did not permit the State to acquire title to any tax-delinquent or unredeemed lands at any time. However, even if the State law had authorized the forfeiture of such lands to the State, that authorization would have been of no effect as regards these United States lands, for it would have been incompatible with the terms of the Volstead Act and therefore would not have been adopted by the act, for the disposition of the public domain lies within the exclusive jurisdiction of the Congress, and in the Volstead Act the Congress contemplated and provided for transfer of the Government's title in the encumbered lands by United States patent only. This therefore no State law could change or affect.

Accordingly, when United States lands are bid in by the State and held in the hope of assignment to some subsequent purchaser at private sale, their title does not go to the State but continues in the United States regardless of the length of time during which the State may have to hold the lands before a purchaser appears. When such a purchaser does appear and meets the requirements, the title passes

to him not out of the State by State tax deed but out of the United States by United States patent.

The qualified individual satisfying the liens at the tax sales mentioned, whether public or private, is not a homestead entryman. He does not act under the homestead law and is not subject to its requirements of residence and improvements. Seeking the lands under the quite different terms of the Volstead Act, he is a *Volstead* purchaser, or *Volstead* entryman, and upon proof of satisfaction of the liens and full cash payment for the lands he becomes entitled to receive *Volstead* patent, namely, United States patent issued under the terms of the Volstead Act. A further important feature, frequently overlooked, is that as soon as the individual meets the statutory conditions the security right of the State matures, and the State becomes entitled to have the procedures which the Volstead Act authorized for its benefit completed by United States issuance of Volstead patent to the Volstead purchaser.

These two rights, when they ripen, are rights to *Volstead* entry and patent and not to *homestead* entry and patent. It results, therefore, that they will except any lands to which they attach from withdrawal from *Volstead* entry and patent but not from *homestead* entry and patent. For it is a well-established rule that rights to a particular form of disposition of public lands bar withdrawal of the lands to which they attach from that form of disposition but do not bar withdrawal from any other form of disposition under the public-land laws.

This does not mean that Volstead entry was preferable to homestead entry. From the State's point of view, homestead entry of the assessed lands was desirable, because in the entryman there would be a known debtor from whom the State might hope to collect the liens without resort to tax sales and their uncertain outcome. But the fact that homestead entry was desirable did not mean that the act gave the State a right to it. Indeed, what the act was intended to provide was a substitute for homestead entry, a right to the full operation of a procedure whereby in the person of a possible purchaser at tax sales a substitute for a homestead entryman might be found when lands were unentered or an existing entryman had defaulted. Hence, in the face of a withdrawal the State's saving right is to the Volstead procedure, not to the procedure of homestead entry.

In the light of this exposition, it is pertinent now to consider in what manner the act has been applied to the lands sought by Palm. According to the record, these tracts were assessed annually for 20 years, 1917-1936, for the construction of Judicial Ditch No. 63. Being unentered and without anyone obligated to pay the liens, they became delinquent and, on May 12, 1919, were offered at public sale

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at Roseau, the county seat.<sup>5</sup> There being no purchaser, the lands were bid in by the State of Minnesota. Throughout the 26 years since then they have been held by the State, awaiting settlement of the liens by some Volstead purchaser from the State or by some homestead entryman if one should appear while homestead entry was still permitted. Despite the lapse of time, the title to the tracts and therefore the control of them have remained in the United States, in accordance with the legal principles explained above.

On September 19, 1934, as has been seen, the Department, with a view to restoration of the lands to tribal ownership, withdrew from entry all the ceded lands that were unreserved and *unappropriated*, subject to existing valid rights. For 6 months it held that this withdrawal barred homestead entry of the encumbered lands except in the case of prior settlement, and on this ground the General Land Office rejected Palm's first application, G. L. O. 05633, for homestead entry. It appears that in May 1934, Palm, having learned from the Land Office that these lands were open to entry, went upon the tracts and cleared 30 acres. But he did not live on them and he did not file his application until October 2, 1934, 13 days after the withdrawal. The Land Office held that for lack of residence he had not made settlement and therefore had no right saving the lands from the withdrawal.

On March 13, 1935, however, the Department ruled that the encumbered lands were not withdrawn from homestead entry. Interpreting the liens as an appropriation by the State, it held that the lands were not "*unappropriated*" and therefore were not withdrawn. Because of this, the Land Office on June 28, 1935, reinstated Palm's application, doing this of its own motion. Thereafter, Palm extended his improvements, clearing and cropping more land, building a small house and a barn, worth about \$300, and paying some installments due on the purchase price. Then, confronted with a State ditch lien of nearly \$900 on lands that were being sold for \$213.86 and unable to pay such a price for what in other locations would have been a free homestead, Palm had to abandon his entry<sup>6</sup> and thereby forfeit the moneys which he had already paid.

Despite this second misfortune, Palm did not give up hope of getting the land. Learning that the State might help him to satisfy the ditch tax by making some adjustment, he wrote the Land Office in March 1940 about refiling for part of the land. But now Palm ran against a third snag. By this time the Land Office was questioning the ruling of March 1935, and while awaiting a new decision

<sup>5</sup> Roseau County auditor's report, G. L. O. Misc. 863352, envelope 14.

<sup>6</sup> Canceled March 8, 1940.

it was suspending applications for homestead entry of the encumbered lands. For nearly a year, therefore, Palm delayed action. But when by December 30, 1940, no new ruling had been made, he filed the application in the present case, G. L. O. 08365, for second homestead entry of part of his original claim, namely, 91.09 acres instead of the 171.09 first entered.

Having suspended such applications, the Land Office at first took no action on Palm's new papers. Then, late in 1941, the 1935 ruling not yet having been revoked, the Land Office took up the case. It ascertained from the Roseau County auditor the amount of the liens and notified Palm of the sums to be paid. Further, at Palm's request it gave him successively three 60-day extensions of time for payment in order that he might conduct and complete his negotiations for satisfaction of the liens. On June 10, 1942, Palm wrote that he had "taken care of the taxes" and later sent the auditor's statement of August 2, 1942, certifying that there were no existing tax liens.

On August 12, 1942, the Department's new ruling was handed down in the Solicitor's opinion of that date.<sup>7</sup> Its interpretation of the Volstead Act has been outlined above in this decision. In pursuance thereof, the Department overruled the administrative holding of March 13, 1935. It ruled that the encumbered ceded lands were effectively withdrawn from homestead entry. It considered that the liens were not an appropriation by the State and that while the act gave the State a right to see United States patent issue to whoever should fulfill the Volstead conditions, it did not give the State a right to the continuance of homestead entry. Thereafter, on November 26, 1942, the Land Office rejected Palm's application for second entry, thus disappointing his hopes for the fourth time. Its decision, recapitulated above, held, first, that despite the county auditor's certificate to the contrary the liens on Palm's claim still existed; and, second, that Palm's application for homestead entry of the withdrawn and encumbered lands must be rejected in view of the new ruling that withdrawal bars homestead entry of the encumbered lands although not barring their entry under the Volstead Act.

As concerns the conclusion that the liens still exist on Palm's claim, the following facts should be noted: It will be recalled that, as above explained, the "sale" of these United States tracts to the State for delinquent drainage charges did not pass their title to the State in 1919 or at any other time. It appears, however, that the legal principles which have been seen above to preclude the State's appropriation of these lands have of late been wholly overlooked in Minnesota and an appropriation of the lands by the State declared.

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<sup>7</sup> *Supra*, footnote 1.

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In opinions of January 13 and 26, 1938, the Minnesota attorney general held that these United States lands had been forfeited to the State.<sup>8</sup>

Since valid forfeiture involves cancellation of all back taxes and unextended liens for special assessments of all kinds, it was to be expected that in pursuance of the attorney general's opinion the appropriate county officers would note the alleged forfeiture on their books and cancel the liens of record. This some of the counties did, notably Lake of the Woods County.<sup>9</sup> Roseau County, however, for reasons that do not appear, has not followed the attorney general's opinion. The correspondence with the Roseau County auditor clearly indicates that in 1941 and 1942 the liens on the lands in this case were being carried on the county books as quick liens. Had the county considered the liens as having been extinguished by an alleged forfeiture, the auditor would have been obliged to report those facts. He could not have written such a letter as that of October 27, 1941, presenting an itemized statement covering 20 years and telling the Land Office that at that writing the liens and fees amounted to \$494.96 and on December 1 would be \$544.34. Nor would the Land Office then have required Palm to pay the liens and given him three separate 60-day extensions of time in order to negotiate with the county board for their adjustment.<sup>10</sup>

As to those negotiations, the correspondence of record shows conclusively that with the help of a lawyer friend, Mr. H. C. Engebretson of Roseau, Palm petitioned the county board for an adjustment and that it was as a result of those efforts that Palm was able to write on June 10, 1942, that he had "taken care of the taxes" and later to submit the auditor's statement of August 5, 1942, certifying that there were no tax liens existing against these lands.

It is clear, therefore, that in its first conclusion the Land Office decision disregarded facts that were of record and made a wholly unjustified statement when, in referring to the information given in the auditor's certificate, it said:

\* \* \* This information was based on the erroneous entries on the County books to the effect that lands assessed or sold for drainage charges under the act of May 20, 1908, have been forfeited to the State for nonpayment of drainage taxes and by such forfeiture have been cleared of liens. \* \* \* the liens arising under the Volstead Act of May 20, 1908, still exist. [Italics supplied.]

<sup>8</sup> For brief digests of these opinions see Mason's Minnesota Statutes 1927, vol. 3, 1940 Supp., sec. 5620-13½ (footnotes).

<sup>9</sup> See auditor's letter of July 10, 1941, to G. L. O. in G. L. O. 08254; also appearing as appendix III in Solicitor's opinion of August 12, 1942, 58 I. D. 65.

<sup>10</sup> For these extensions see G. L. O. letters of December 22, 1941, March 11 and May 29, 1942, in this file (G. L. O. 08365).

The sole conclusion warranted by the record is that no forfeiture was noted on the Roseau County books, that the liens were carried there until through Palm's efforts they were wiped out, and that the auditor's certificate is correct in stating that the liens do not exist.<sup>11</sup>

The second conclusion likewise was erroneous. In part, it says of Palm's lands, assuming them to be lien burdened, they "were no longer subject to homestead entry but \* \* \* they may be entered under the Volstead Act." This, of course, is to say that Palm's lands may be entered by one who performs the conditions of the Volstead Act, showing settlement of liens and paying the whole purchase price. In effect, Palm himself meets these conditions. He has negotiated a settlement of the liens, he has submitted proof thereof, and he has offered the full purchase price to the Land Office.<sup>12</sup> Thus, although nominally an applicant for homestead entry, Palm is really on the point of completing what is required of an applicant for Volstead entry. In such circumstances, it is hard to see in what essentials he differs from a Volstead applicant or why he should not be entitled to receive Volstead patent to the land. This possibility, however, the Land Office did not consider. Failing to recognize that the liens had been extinguished in fact, its decision necessarily failed to take account of the fact that this release of the lands resulted from Palm's negotiations with the county board, that the transaction was the equivalent of a tax sale, and that upon tender of the full purchase price Palm would have met the Volstead conditions and would have become entitled to make Volstead entry of the withdrawn lands.

Nor did the decision give heed to the State's rights in the premises. It adjudicated the case as if the sole question to be considered was the right of an individual to make homestead entry. Yet, as the Department pointed out at some length in the opinion of August 12, 1942, the Volstead system although serving the individual was designed primarily in the interest of the State, and the State's interest is as much bound up in the demand right of the Volstead applicant to the issuance of United States patent as in its own privilege right to conduct a drainage operation, impose a lien, or hold a tax sale unhindered by the United States Government. Accordingly, to the State as well as to the Volstead applicant, the Act gives a right to expect United States disposition of the lands by Volstead patent when the statutory conditions are met.

This right of the State is always to be borne in mind and requires examination here. In this case the tracts sought are among those

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<sup>11</sup> In this connection it will be noted that the auditor's certificate submitted by Palm with his appeal stated, "full payment has been made of the amount heretofore levied," etc.

<sup>12</sup> See letter of October 28, 1943, G. L. O. 08365.



June 30, 1945

lands the drainage of which is generally recognized to have been faulty and unsuccessful and most of which in consequence have lain idle and unsought through the years, the liens meanwhile, however, mounting to figures out of all proportion to the value of the lands and presenting an ever higher and more effective barrier to private ownership of the lands, as well as to reimbursement of the original assessments. It is not surprising, therefore, that from time to time vis-à-vis particular applicants the State should have been willing to adjust liens, by reduction or even complete extinguishment, in order that it might finally secure those tax-paying owners whom the Volstead Act was designed to find. Particularly is it not surprising that it should have been willing to do this in the case of Palm, Palm the only person ever to have applied for these tracts in the 29 years since they were first assessed.

In the Department's view, such adjustments are not incompatible with the Volstead Act and do not diminish the State's rights thereunder. Nor does the degree of concession which the State deems appropriate in particular circumstances seem to be a matter of Federal concern. In Palm's case, the State has completely released the lands from the liens. The papers filed with the Land Office do not give the details or the terms, but the county auditor's "Certificate Releasing Ditch Liens," filed with Palm's appeal to the Department and quoted on page 71 hereof, states that full payment has been made of the assessments and that in consideration of such payment the lands are released from the liens. It would appear that this formal statement of payment can be accepted without question by the Federal Government, made as it is under the seal of a responsible Minnesota official. Accordingly, the liens having been settled, proof of payment having been made, and the whole purchase price due having been offered by Palm, the Department considers that the statutory conditions have been met, that the State's Volstead right has matured with Palm's, and that the Government is obligated to issue United States patent to Palm upon his payment of the total purchase money due and the drainage survey charge of 3 cents per acre required by section 8 of the Volstead Act.

In connection with the balance now due from Palm, account will be taken of the following facts:

1. The Land Office letter of June 28, 1935, reinstated Palm's first application, G. L. O. 05633, and related to the following subdivisions and acreage:

T. 159 N., R. 40 W., 5th P. M.,		Acres
sec. 27	E½SE¼	80
	SW¼SE¼	40
	lot 3	51.09
Total		171.09

For this acreage the letter requested Palm to make payments as follows:

Fees -----	\$10
Commission -----	4
	<hr/> \$14.00
Lot 3, excess of 11.09 acres @ \$1.25 -----	13.86
	<hr/>
Total -----	27.86

Palm complied with the request and paid the full sum on August 2, 1935. When making the instant second entry, G. L. O. 08365, on December 30, 1940, Palm applied for only 91.09 acres, dropping the 80 acres in E $\frac{1}{2}$ SE $\frac{1}{4}$  but retaining the other subdivisions above described, including the excess acreage in lot 3, for which he has already paid the full purchase price of \$13.86. The Indians, having received credit for this payment, are not entitled to be paid for the excess a second time. Accordingly, Palm is not to be charged for the 11.09 acres in lot 3 in connection with this second entry.

2. Land Office letters of August 1, 1939, and November 24, 1939, give the impression that Palm paid a considerable additional sum on account of the total purchase price of \$213.86, for they state the balance due as of those dates to be \$128.31 and 52 cents interest. If this figure prove to have been correct, any installments paid by Palm in 1936 and 1937 on his first entry should, like the sum for the excess acreage, be credited to his second entry. The amounts paid will be verified in the customary manner and also by consultation with the Indian Office.

3. Payments made by Palm in connection with his current application are noted in his letters as follows:

December 26, 1940 -----	\$7.00
June 10, 1942 -----	20.00
August 6, 1942 -----	2.77
	<hr/>
Total -----	29.77

4. Palm has, therefore, paid fees and commissions on both applications. The total paid exceeds the total due on the current application. The excess is to be credited to Palm on account of the purchase price.

5. There are discrepancies between the Commissioner's letters of November 14, 1941, and July 10, 1942, regarding the amount of the purchase price.

The Commissioner will ascertain what other payments, if any, have been made by Palm on account of the purchase price and will deduct their total also from the total purchase price due from Palm. He will notify Palm of the total cash payment to be made and of the period within which it must be made to entitle Palm to a patent.

July 24, 1945

The Commissioner's decision is reversed, and United States patent will issue to appellant upon his compliance in full with the Commissioner's notice above described.

OSCAR L. CHAPMAN,  
*Assistant Secretary.*

LOYAL N. MASSEY  
LEONA MASSEY

A-23861

*Decided July 24, 1945*

**Enlarged-Homestead Entry—Desert-Land Entry—Withdrawals.**

Desert-land and enlarged-homestead entries cannot be allowed on land withdrawn as a game refuge by an Executive order which reserved the land for the conservation and development of natural wildlife resources and for the protection and improvement of public grazing lands and natural forage resources. The withdrawn land has been segregated from the public domain and is not subject to private acquisition under the public-land laws.

**APPEAL FROM THE GENERAL LAND OFFICE**

Loyal N. Massey and Leona Massey, his wife, both of Salt Lake City, have appealed from a decision of the Assistant Commissioner of the General Land Office which, on March 3, 1944, affirmed the register's rejection of their applications, Carson City 021709 and 021730, filed September 30 and October 4, 1943, for enlarged-homestead entry and desert-land entry, respectively. The lands sought are described as follows:

Carson City 021709, Loyal N. Massey, enlarged homestead,

T. 17 S., R. 59 E., M. D. M., Nevada, sec. 32, E $\frac{1}{2}$ SW $\frac{1}{4}$ , W $\frac{1}{2}$ SE $\frac{1}{4}$ ;

T. 18 S., R. 59 E., sec. 5, W $\frac{1}{2}$ NE $\frac{1}{4}$ , E $\frac{1}{2}$ NW $\frac{1}{4}$ ;

320.76 acres.

Carson City 021730, Leona Massey, desert entry,

T. 18 S., R. 59 E., M. D. M., Nevada, sec. 5, SE $\frac{1}{4}$ NE $\frac{1}{4}$ , SE $\frac{1}{4}$ ; sec. 4,

W $\frac{1}{2}$ SW $\frac{1}{4}$ , NE $\frac{1}{4}$ SW $\frac{1}{4}$ ;

320 acres.

All are included within Nevada Grazing District No. 5, established<sup>1</sup> November 3, 1936, and also within the Desert Game Range established<sup>2</sup> May 20, 1936, having been added thereto on August 4, 1943.<sup>3</sup>

Under section 1 of the Taylor Grazing Act of June 28, 1934 (48

<sup>1</sup> Departmental order, 1 F. R. 1748.

<sup>2</sup> Executive Order No. 7373, 1 F. R. 427, issued in pursuance of the President's authority under the Constitution, and the act of June 25, 1910 (36 Stat. 847), as amended by the act of August 24, 1912 (37 Stat. 497; 43 U. S. C. secs. 141-142).

<sup>3</sup> Public Land Order No. 156. (See 8 F. R. 11224 and G. L. O. Misc. 1644535.)

Stat. 1269), these lands, being included within a grazing district, were withdrawn from all forms of disposal. However, if not otherwise reserved, they could be restored to entry upon appropriate classification under applicable public-land laws in accordance with section 7 of that act, as amended by the act of June 26, 1936 (49 Stat. 1976; 43 U. S. C. sec. 315f). The register, finding that the tracts were otherwise withdrawn and reserved by their addition to the Desert Game Range above mentioned, held both applications for rejection in notices dated September 30 and October 4, 1943, respectively.

A letter from Mr. Massey to the United States land office in Carson City, dated October 25, 1943, and filed November 3, 1943, has been treated as an informal appeal to the Commissioner for both Mr. Massey and his wife. This appeal stated that Massey had spent considerable time and money investigating the agricultural possibilities of these lands. He was convinced of the superlative agricultural character of their soils, of the certain presence of pump water, and of the probable presence of artesian water. In effect, Massey asked permission to drill to establish the soundness of his contention that ample water would be found at reasonable depth for development at reasonable cost. He also stated that these lands, being without surface water, were useless both for grazing and for wildlife at any period of the year but that cultivation of them would attract wildlife. Such cultivation would also greatly aid in the prosecution of the war, supplying local produce to Las Vegas and the surrounding country and thus effecting large savings in the gas, oil, rubber, trucking equipment, shipping charges, and manpower now required by the long haul of 90 percent of the supplies needed by Las Vegas. Implicitly, the appeal sought elimination of these tracts from the Desert Game Range withdrawal in order that appellants might have a home and an enterprise to which their two sons and their son-in-law, all three now in service, might return at the end of the war.

Massey further stated that the Refuge Manager of the Desert Game Refuge shared all his views concerning the lands, and he enclosed a copy of the manager's letter of October 23, 1943, to the Regional Director of the Fish and Wildlife Service in Portland, Oregon, about these lands. This pointed out that the lands sought were part of 1,000 acres of old lake-bottom land not being utilized by wildlife. This land, it seemed to him, would be suitable for farming, provided water could be made available, and small irrigated farms, so much needed here, would greatly increase the value of the area for wildlife, particularly upland game birds. The Refuge Manager suggested examination of the soils and of the water possibilities with a view to a farming use of the suitable tracts. His suggestions, he said, had the endorsement of the Grazing Service.

*July 24, 1945*

On March 3, 1944, the Assistant Commissioner of the General Land Office affirmed the register's decisions rejecting the applications, pointing out that because of the game-range withdrawal the lands were not subject to either type of entry and holding that nothing in the appeals warranted disturbing the register's decision. On March 22, 1944, Mr. and Mrs. Massey filed with the Department a letter which has been treated as an informal appeal to the Secretary. This appeal repeats the arguments of the letter of October 25, 1943, set forth above and requests time for appellants to obtain for the "land department" the information which "the game department and the grazing department" can give in favor of the farming use of the lands.

It is to be noted that the agencies here referred to as "departments" are not "departments" but only subordinate units of the Department of the Interior. They function under the direction of the Secretary of the Interior, reporting to him and furnishing him whatever special information and advice they have concerning the matters with which he has to deal. Their special knowledge is available also to any departmental unit that may require it. In this case, the Secretary and the General Land Office are already acquainted with the facts concerning this land and with the official opinion of the agencies concerned with it, in particular that of the Fish and Wildlife Service. It is, therefore, unnecessary for appellants to try to obtain information for the benefit of the Land Office and to be allowed time to do so.

As regards appellants' requests, the Department finds that considerations of both policy and law preclude elimination of these lands from the game range. The Fish and Wildlife Service does not approve the Refuge Manager's recommendation to the Regional Director. The Service points out that the special farming development proposed is not only very uncertain of success but would threaten the conservation of the big game population of the range and be contrary to the administrative policy of the Service for range management. The area in question has been withdrawn especially to preserve the hereditary habitat of one of the largest remaining herds of Nelson's mountain sheep, "Big Horn Sheep," and to encourage reintroduction of the deer and the antelope which once occupied parts of this region. Further, the townships embracing the tracks here sought are part of one of the most vital lambing grounds in the entire game range and should be reserved for that use by the mountain sheep. In addition, these lands are within the boundaries of Nevada Grazing District No. 5 and are subject to livestock grazing under the supervision and administration of the Grazing Service.

It follows that in the development of the range the springs and water resources found on it must be reserved for both wildlife and the livestock foraging on it. Certain necessary springs and water

rights the Fish and Wildlife Service holds under purchase contract, and the present headquarters of the Desert Game Range at Corn Creek has an artesian well and a good spring. There is no assurance, however, that the underground waters here could supply both the needs of the headquarters and the additional demands which would be imposed by agricultural enterprises in the interior basin of the range. Indeed, the Service is apprehensive that any such development here would wreck the flow of the water supply which is so indispensable to the range administration. In such circumstances, suspension of the withdrawal for appellants' purpose could not be other than contrary to public interests.

But even if there were an ample and assured water supply, the law does not permit approval of appellants' proposal for an agricultural development in the interior basin of the range, and the Secretary is without legal authority to dispose of the range lands. This appears from the terms of Executive Order No. 7373 establishing the Desert Game Range.<sup>4</sup> By that order the lands described and those subsequently added were withdrawn from disposal and "reserved and set apart for the conservation and development of natural wildlife resources and for the protection and improvement of public grazing lands and natural forage resources."

In its relation to conservation and wildlife, the range was placed under the joint jurisdiction of the Secretaries of the Interior and Agriculture. In its relation to the public grazing lands to be included within the range and to their natural forage resources, the range was to be under the exclusive jurisdiction of the Secretary of the Interior if and when said lands should be included within a grazing district duly established under the Taylor Grazing Act. But those lands within the range which had been or might be purchased by the United States for the use of the Secretary of Agriculture for conservation of migratory birds or other wildlife were to be under the exclusive administration of the Secretary of Agriculture.<sup>5</sup>

The order also restricted the use of the natural forage resources of the range. It directed that these should be utilized, first to sustain in healthy condition a maximum of 1,800 animals of a primary species, namely, Nelson's mountain sheep, and then to sustain such members of nonpredatory secondary species as might be necessary for balanced wildlife population; but in no case was the consumption of forage by the combined wildlife populations to be allowed to increase the burden of the range dedicated to the primary species. After satisfaction of the needs of the primary and the secondary species, then and

<sup>4</sup> *Supra*, footnote 2.

<sup>5</sup> For the statutory authority for the administration of the Desert Game Range, see the appendix hereto.

July 24, 1945

only then were the forage resources of those lands within the preserve, which had been public grazing lands and were included or to be included within a Taylor Act grazing district, to be available for livestock grazing under rules and regulations promulgated by the Secretary of the Interior in pursuance of the Taylor Grazing Act. As for those lands within the range which were purchased for wildlife conservation, although these were not to be included within a grazing district, their forage resources might nevertheless be utilized for public grazing purposes to such degree as the Secretary of Agriculture might determine to be compatible with the purposes of their acquisition.

A further point to be noted is that this order amended Executive Order No. 6910 mentioned in section 7 of the Taylor Act by specifically excluding the lands of the game preserve **from the operation of the** directives of that order for classification and other purposes.

From all these considerations, it is clear that the reservations described have effectively segregated the game-preserve lands from the public lands, the words "public lands" being the words habitually used in our legislation to describe such lands as are subject to sale or other disposal under general laws, and have appropriated them to a special purpose wholly incompatible with that of final disposal under the public-land laws. The reservations have, therefore, freed the lands from the operation and demands of the public-land laws and have made them the absolute property of the Government, no longer subject to private acquisition. For the Supreme Court has long held that once lands are legally appropriated to some purpose they, from that moment, become severed from the mass of public lands, passing out of the control of the General Land Office and remaining beyond it unless in some lawful manner they are returned to its jurisdiction. In *United States v. Minnesota*, 270 U. S. 181, 206 (1926), Mr. Justice Van Devanter summarized the rule as follows:

\* \* \* lands which have been appropriated or reserved for a lawful purpose are not public and are to be regarded as impliedly excepted from subsequent laws, grants and disposals which do not specially disclose a purpose to include them.

See, also, *Wilcox v. Jackson*, 13 Pet. 498, 513 (1839); *Scott v. Carew*, 196 U. S. 100, 111 (1905); *Leavenworth, etc., R. R. Co. v. United States*, 92 U. S. 733, 745 (1875); *Van Lear v. Eisele*, 126 Fed. 823, 825 (1903).

It is also clear that the jurisdiction conferred on the Secretary of the Interior is *for a limited purpose only*, namely, the administration and protection of the forage resources of the lands and of the use thereof.<sup>6</sup> In no sense does it constitute a return of the lands to the

<sup>6</sup> This is true both of the jurisdiction conferred on the Secretary of the Interior by the order creating the range and of that conferred on him by Reorganization Plan No. II as explained in the appendix hereto.

Secretary's jurisdiction for purposes of general control and final disposal. The lands, accordingly, are still reserved and are not subject to classification and restoration to entry under section 7 of the Taylor Grazing Act or to alienation under the public-land laws.

Finally, it is to be emphasized that the lands of the preserve, unlike other lands in Nevada Grazing District No. 5, within which the preserve was included on November 3, 1936, are encumbered by the unlimited usufructuary right created in the Government as above described, namely, the right to have and enjoy all the fruits and produce of said lands. This fact alone would be sufficient to prevent the Secretary from restoring the lands for disposal under section 7, for there is no "applicable" public-land law authorizing the Secretary to patent lands the usufruct of which remains in the Government. See *Dean Willard Pulsipher*, A. 22491 (Carson City 020806), December 14, 1940 (unreported).

Accordingly, the Commissioner's decision is affirmed.

OSCAR L. CHAPMAN,  
*Assistant Secretary.*

APPENDIX TO THE DEPARTMENTAL DECISION IN LOYAL AND LEONA MASSEY, A-23861, CARSON CITY 021709 AND 021730, IN RE THE ADMINISTRATION OF THE DESERT GAME RANGE IN NEVADA

The statutory authority for the administration of the Desert Game Range in Nevada created by Executive Order No. 7373 of May 20, 1936 (1 F. R. 427), as that authority was distributed between May 20, 1936, and July 1, 1939, is as follows:

1. For administration by the Secretary of the Interior of that part of the range consisting of the public grazing lands for the conservation of wildlife in connection with grazing districts, see the Taylor Grazing Act of June 28, 1934 (48 Stat. 1269; 43 U. S. C., 1934 ed., sec. 315 *et seq.*).

In this connection, see Secretary of the Interior file 2-185 (part 4), for letters as follows: February 20, 1935, Secretary to Chairman Robertson of House Committee on Conservation of Wildlife Resources; March 2, 1935, Secretary to Representative Isabella Greenway; March 2, 1935, Secretary to the Governor of Oregon. See, also, file 2-147 (part 1), Secretary's letters of December 10, 1934, concerning the Denver conferences of February 11-16, 1935, on the administration of the Taylor Grazing Act in its several aspects.

2. For administration by the Secretary of Agriculture of that part of the range consisting of lands purchased for the use of the Department of Agriculture for wildlife conservation purposes, see the Migratory Bird Conservation Act of February 18, 1929, in particular sec-



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tions 6 and 10 (45 Stat. 1223, 1224; 16 U. S. C., 1934 ed., secs. 715-715r, especially sections 715e and 715i); Agricultural Appropriation Act of May 17, 1935 (49 Stat. 247, 270), appropriation for the Bureau of Biological Survey for maintenance of *mammal* and bird reservations and for maintenance of game introduced into suitable localities on public lands under supervision of the Biological Survey; and a similar provision in the Agricultural Appropriation Act of June 4, 1936 (49 Stat. 1421, 1446), and subsequent Agricultural Appropriation Acts in 1937, 1938, and 1939.

3. For administration of the whole range by the Secretary of the Interior alone since June 30, 1939, see the President's Reorganization Plan No. II, effective July 1, 1939, under 5 U. S. C., 1940 ed., sec. 133s. This by section 4 (F) transferred the Bureau of Biological Survey to the Department of the Interior. It also transferred to the Secretary of the Interior all the functions of the Secretary of Agriculture relating to the conservation of wildlife, game, and migratory birds under the statutes above cited. By section 4 (E) the Bureau of Fisheries was transferred from Commerce to Interior, and later on the Biological Survey and Fisheries were combined to function as the Fish and Wildlife Service of the Department of the Interior.

4. After 1939, the annual appropriation for maintenance of mammal and bird reservations was made in the Interior Department Appropriation Acts. See Interior Department Appropriation Act of June 18, 1940 (54 Stat. 406, 453), and subsequent such acts.

5. Further, it is to be noted that in 16 U. S. C. sec. 715 *et seq.*, the 1940 edition of the U. S. Code substitutes *Department and Secretary of the Interior* for *Department and Secretary of Agriculture* wherever the latter terms occur in the same title and sections of the 1934 edition of the Code, thus creating an erroneous impression concerning the original content of the Migratory Bird Conservation Act of February 18, 1929 (45 Stat. 1222).

## INVENTION OF A SINGLE- OR MULTIPLE-DRUM HOIST

**Date of Invention—Order No. 1763—General Scope of Employee's Governmental Duties.**

An invention, the utility of which was visualized in 1937 but which was not completely conceived until 1945, was made after the issuance of Departmental Order No. 1763 of November 17, 1942, and is subject to its provisions. A mining engineer, whose duties include the solution of engineering problems affecting mine production, is engaged in research or investigation, within the meaning of Order No. 1763.

The invention of a Drum Hoist which will increase mining efficiency, made by an engineer assigned to engage in research upon the subject in the course of his investigations, is relevant to the general field of his duties, and is required to be assigned to the Government.

M-34149

AUGUST 9, 1945.

THE SECRETARY OF THE INTERIOR.

MY DEAR MR. SECRETARY: My opinion has been requested concerning the relative rights of the Government and the inventor in a Single- or Multiple-Drum Hoist invented by Edward F. Courtney, an engineer employed in the Mineral Production Security Division of the Bureau of Mines at the time of his invention.

Mr. Courtney states that he visualized the utility of a hoist that could be dismantled and transported in sections in 1937, when he was employed in private industry, and discussed it with his wife and brother at various times. There does not appear, however, to have been a complete conception of all the details of his invention until sometime in 1945, when Mr. Courtney was working for the Mineral Production Security Division. The first sketch of the invention was made in April 1945, and the first written description is dated May 2, 1945. Accordingly, under the rules set forth in opinion dated March 31, 1943, 58 I. D. 374, the invention was made after November 17, 1942, and ownership of the invention is to be determined under Departmental Order No. 1763 of that date.

The invention report recited numerous objects of the invention, the most important of which may be summarized in Mr. Courtney's words, "a hoist of sectional construction of individual sections that can be dismantled without danger of dirt or other foreign matter entering the working parts, and which permits of easy transportation, repair, or assembly."

As a mining engineer in the Mineral Production Security Division, Mr. Courtney's duties required him to inspect mines from which minerals vital to war production were extracted, and to suggest means for increasing the productivity of the mines, as well as for decreasing operating hazards and for affording protection against sabotage. Usually the means suggested were well-established mining techniques, but if a new problem arose, Mr. Courtney was expected to use his ingenuity to find a solution. His invention appears to be especially adapted to the problem of getting slusher hoists into and out of stopes through small-sized manways and chutes, one that he frequently encountered in the course of his inspections. As stated in opinion of September 19, 1944, 58 I. D. 738:

If an employee's duties, either as described in his job sheet or as assigned by his supervisors, involve the application of known principles to practical prob-

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lems and such existing solutions as may be known to the employee are unsatisfactory, and if in these circumstances good craftsmanship and professional competence require the employee to engage in research or investigation in an attempt to reach an adequate solution, an employee given such an assignment is considered to be engaged in research or investigation.

Examining Mr. Courtney's duties in the light of this statement, they included research and investigation. The details of the invention were developed in Mr. Courtney's mind during the course of his assigned research and investigation, and the device was clearly relevant to the field of his assigned duties. Accordingly, the invention was made within the general scope of Mr. Courtney's governmental duties, as defined in Order No. 1763, and is required to be assigned to the Government. It is, therefore, unnecessary to determine whether the invention was substantially made or developed on Government time, with Government facilities or financing, or with the aid of Government information not available to the public.

FOWLER HARPER,  
*Solicitor.*

Approved:

MICHAEL W. STRAUS,  
*Assistant Secretary.*

### INVENTION OF PERFORATED CONCRETE FORM LINER

#### Date of Invention—Order No. 1763—Analysis of Inventor's Duties— "Substantial."

An invention, the possibilities of which were considered in 1940 but which was not disclosed to others or reduced to practice until November 1944, is subject to Departmental Order No. 1763 of November 17, 1942.

Research and investigation form part of the duties of a construction engineer who is required to give advice upon "improvements in construction plant to obtain greater efficiency of operation."

An inventor whose duties include research and investigation into more efficient construction methods at the dam where he is employed, who invents a method for producing a better surfaced concrete for use at the dam, is required to assign his invention to the Government under Order No. 1763.

An invention is required to be assigned to the Government if it is substantially developed on Government time, using Government facilities.

M-34150

AUGUST 13, 1945.

THE SECRETARY OF THE INTERIOR.

MY DEAR MR. SECRETARY: My opinion has been requested concerning the relative rights of the Government and the inventor in a Perforated Concrete Form Liner invented by Donald S. Walter, em-

ployed by the Bureau of Reclamation as assistant construction engineer at the Anderson Ranch Dam, Anderson Dam, Idaho.

In his invention report Mr. Walter says: "Although the inventor has considered the possibilities of a perforated form liner for concrete since October 1940, it was not until November 7, 1944, that the idea was actually tried out." It would thus seem that Mr. Walter's invention existed as an inchoate idea rather than a complete conception until November 1944. But even assuming that he had his device completely in mind as early as 1940, Mr. Walter did not disclose it to others until November 1, 1944, reduce it to practice until November 7, 1944, or prepare a written description until February 5, 1945. Accordingly, rights in the invention must be determined under Departmental Order No. 1763 of November 17, 1942. As stated in opinion M-33699 of July 14, 1944:

\* \* \* for the order not to apply, the date of an invention prior to November 17, 1942, must be capable of proof by demonstrable overt action on the part of the inventor, such as disclosure, either orally or in writing, or the preparation of working drawings or a model that can be dated in some way. \* \* \*

Tested under this rule, the Perforated Form Liner was "made" after the effective date of the order.

Section 2 (a) of the order provides that an invention will be considered within the general scope of an employee's governmental duties, and required to be assigned to the Government—

\* \* \* (1) whenever his duties include research or investigation, or the supervision of research or investigation, and the invention arose in the course of such research or investigation and is relevant to the general field of an inquiry to which the employee was assigned, or (2) whenever the invention was in substantial degree made or developed: through the use of Government facilities or financing, or on Government time, or through the aid of Government information not available to the public.

As assistant construction engineer at the Anderson Ranch Dam, Mr. Walter is required to "perform difficult and responsible professional work as engineer in responsible charge of all field operations \* \* \* which will include checking for efficient methods of operations used by the contractor," and serves "in an advisory capacity to the contractor's Project Manager on improvements in construction plant to obtain greater efficiency of operation." Thus it will be seen that one of Mr. Walter's specific duties is to ascertain that the most efficient construction methods are used at the dam. These responsible engineering duties call for research and investigation when necessary to devise better means of performing the construction work of which he is in charge. (See opinions of September 19, 1944, 58 I. D. 738, and M-33877, December 27, 1944.)

August 13, 1945

The need for improving the quality of surface concrete cast against water-tight forms was well known to construction engineers, the absorptive form linings in current use being unsatisfactory in many respects. In view of the importance of devising a method for obtaining a void-free dense surfaced concrete, resistant against freezing and thawing, for use in the tunnels and spillways of dams, the research connected with the reported invention was a part of Mr. Walter's duties. That the invention was regarded by Bureau of Reclamation officials and Mr. Walter's fellow employees as arising in connection with his duties is indicated by the fact that it is the subject of three official Bureau of Reclamation reports: Field Inspection Report No. 19, "Concrete Control, Anderson Ranch Dam, Idaho," by L. H. Tut-hill, dated December 6, 1944; "Perforated Plywood Experiments," by Mr. Walter, dated February 5, 1945, revised March 27, 1945; and "Progress Report of Experimental Tests with Perforated Plywood," by L. P. Witte, dated May 3, 1945. Inasmuch as the invention was the direct and sought-after result of Mr. Walter's research, there can be no question concerning its relevance to his work.

It must, therefore, be concluded that the invention arose within the general scope of Mr. Walter's governmental duties under the first definition quoted above, and is required to be assigned to the Government.

This conclusion is strengthened by the fact that the invention was substantially made and developed on Government time, using Government facilities and financing. It was only an inchoate idea on November 1, 1944, when Mr. Walter disclosed it to two fellow engineers, Messrs. Billings and Houk. It was tested at the dam on November 7, and the results were observed by the two engineers to whom the original idea was disclosed. Government facilities used for mixing and placing the concrete included a concrete mixing plant and an electric vibrator. Much of the important developmental work appears to have been done on Government time. Thus, the fact that the invention was substantially made and developed on Government time, using Government facilities, is a further reason for holding that this invention is required to be assigned to the Government.

FOWLER HARPER,  
*Solicitor.*

Approved:

MICHAEL W. STRAUS,  
*Assistant Secretary.*

**COSTS OF SUBJUGATION WORK ON SALT RIVER INDIAN IRRIGATION PROJECT AS DEFERABLE CONSTRUCTION COSTS UNDER THE LEAVITT ACT OF JULY 1, 1932**

**Indian Irrigation Projects—Subjugation Work on Salt River Project—  
Construction Costs—Deferment Under Leavitt Act.**

The appropriation of \$30,000 for "construction, repair, and rehabilitation" on the Salt River project made by the act of June 28, 1944 (58 Stat. 463, 476), may be used for subjugation of Indian lands under the project. In view of the legislative history of this item, the general practice in recent years in performing subjugation work on Indian projects, and the somewhat artificial character of the distinction between "construction" costs and other types of cost, the funds expended for construction work on the Salt River project may be treated as deferable construction costs under the Leavitt Act of July 1, 1932 (47 Stat. 564; 25 U. S. C. sec. 386a).

AUGUST 17, 1945.

**TO THE ASSISTANT SECRETARY.**

The Commissioner of Indian Affairs has submitted to the Department a letter dated June 2, directing the Superintendent of the Pima Agency to proceed with subjugation work on lands under the Salt River irrigation project as soon as he has obtained the consent of the Indian owners of the land. A form of consent to this subjugation work is attached to the letter and is also submitted for departmental approval. The subjugation work is to be performed with the funds appropriated by the Appropriation Act for the fiscal year 1945, approved June 28, 1944 (58 Stat. 463, 476). The sum of \$30,000 was appropriated by this act under the heading "For the construction, repair, and rehabilitation of irrigation systems on Indian reservations." It is assumed in the Indian Office letter that the subjugation work performed with this appropriation will be part of the construction cost of the project, and as such will be deferable under the Leavitt Act of July 1, 1932 (47 Stat. 564; 25 U. S. C. sec. 386a), so long as the lands remain in Indian ownership. In view of a difference of opinion on this question in the Indian Office, the Commissioner has expressly requested that I give it consideration.

I am of the opinion that the funds to be expended on subjugating the lands under the Salt River project may be treated as "construction costs," the repayment of which is deferred under the Leavitt Act. In a memorandum from Mr. E. R. Moose to Mr. E. C. Fortier, dated April 27, 1945, the legislative history of the appropriations for the Salt River project, as well as the appropriations for a number of other projects, is set forth, and it appears clearly that the Appropriations Subcommittees of the House were informed that part of the funds appropriated would be expended in subjugating the lands

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under the Salt River project.<sup>1</sup> Indeed it seems to have become a general practice for the Indian Irrigation Service to secure appropriations for subjugating Indian lands under Indian irrigation projects.

However, it is not the mere appropriation for subjugation work that is decisive. In the first place, in some cases while the Appropriations Committee was informed that subjugation work was planned, the appropriation actually made for the particular year did not contemplate that subjugation work would be done that year.<sup>2</sup> In the second place, subjugation work could conceivably be regarded as "operation and maintenance" rather than "construction work," and thus might be subject to cancellation rather than deferment under the Leavitt Act. To be able to find that the cost of subjugation work may be treated as a deferrable construction cost, it must appear that the funds appropriated were necessarily treated as construction costs in the appropriation itself. In other words, the question of the applicability of the Leavitt Act to an appropriation for subjugation work is a distinct question.

On the last page of the April 27 memorandum from Mr. Moose to Mr. Fortier, a statement made by Mr. Wathen at the 1938 Hearings to a member of the Appropriations Committee is quoted to demonstrate that the subjugation work to be done on the Salt River project is a deferrable construction cost under the Leavitt Act. Actually this statement does not establish such a proposition. The item under discussion was not for the Salt River project but for "Improvement and maintenance" on the Hopi Reservation. The member in question did not ask directly whether subjugation work was a construction cost. He asked merely whether construction costs in general would be returned by the Indians. The question put and the answer were as follows:

Mr. O'NEAL. It is not expected that the construction costs will be returned by the Indians eventually, is it?

Mr. WATHEN. No; it is not contemplated that the construction costs will be returned. The Leavitt Act of 1932 provides that no construction assessment shall be made so long as the Indians retain title of the land, and there is no question but what they will retain title to that land indefinitely.

At another point in the 1938 Hearings<sup>3</sup> this statement was made to the Committee about the plans for the Salt River project:

<sup>1</sup> The following items of legislative history have been found, some of which are not cited in the Moose memorandum: Senate Hearings on Interior Department Appropriation Bill, 1937, p. 121; House Hearings on Interior Department Appropriation Bill, 1938, pp. 1070-1072; 1939, p. 287; 1940, p. 271; 1942, p. 275; 1945, p. 123.

<sup>2</sup> See, for instance, House Hearings on Interior Department Appropriation Bill, 1938, p. 1064, where a detailed justification of the Colorado River project is made. Subjugation work is listed as item 7 in the program, but no such work was actually to be done in 1938. In fact, in the Hearings on the Appropriation Bill for the fiscal year 1939 at page 282, it was made plain that no subjugation work would be done until 1940.

<sup>3</sup> Pages 1070-1072.

The completion of the irrigation system for the increased area and the subjugation of the additional acreage will require an expenditure of approximately \$315,000. It is proposed to spread this work over a 5-year period. The first year's work contemplates performing the major part of the work of constructing the irrigation system. The second year's work contemplates completion of the irrigation system and the beginning of land subjugation work. The remainder of the program would then consist of land subjugation, estimated to cost \$25 per acre for 6,310 acres. The total irrigable area eventually will be about 9,758 acres.

Again Mr. O'Neal asked in general terms, "What percentage of the construction cost is reimbursable?" and Mr. Wathen replied similarly, "No part of the construction cost is reimbursable so long as the land is in Indian ownership."

It must be remembered, too, that a legal opinion expressed by a witness at a hearing could hardly change the meaning of a prior act of Congress if in fact such opinion is erroneous. This must be especially true when the opinion is expressed by a witness who is not a lawyer.

However, there are several statements in the Hearings from 1938 to 1940 which clearly indicate that subjugation work was accepted by the Appropriations Subcommittees as part of construction cost. While these statements were not made in connection with the Salt River project, they must, nevertheless, be regarded as significant of the general current of thought at the time. Thus it was stated in 1938<sup>4</sup> with respect to the Colorado River project: "It is proposed that the *construction work, including subjugation of the land*, shall be spread over a period of approximately 10 years \* \* \*." Again it was stated at the same Hearing<sup>5</sup> with reference to the Uncompahgre project: "The *construction* program for this division of the former Uintah Indian Reservation contemplates the following work," and in this work was included "Land subjugation." Finally, in 1940,<sup>6</sup> in discussing the Colorado River project, a member of the Committee, Mr. Leavy, asked: "What will it cost when it is completed?" and on this occasion Mr. Wathen replied: "Including subjugation, *which we propose to take care of in our construction*, it will cost in the neighborhood of \$100 an acre." [Italics supplied in various quotations.]

In the Hearings on the 1945 Appropriation Bill,<sup>7</sup> it was explained that the Salt River project item was intended principally as an appropriation for subjugation, but it was not expressly stated that it was to be treated as an item of construction cost. However, this appears from the appropriation itself, since it is for "construction,

<sup>4</sup> House Hearings on Interior Department Appropriation Bill, 1938, p. 1064.

<sup>5</sup> *Ibid.*, p. 1088.

<sup>6</sup> House Hearings on Interior Department Appropriation Bill, 1940, p. 296.

<sup>7</sup> House Hearings on Interior Department Appropriation Bill, 1945, p. 123.



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repair and rehabilitation.”<sup>8</sup> Subjugation work could be a form of “repair and rehabilitation” if it consisted of releveling and bordering land once already irrigated, and there is an indication that this may be true of some of the land in the Salt River project<sup>9</sup> which is now to be subjugated. But this apparently can be true of only a small part of the acreage. The new land subjugated could be treated only as part of the construction work, and in view of the fact that the Appropriations Committees in recent years had been advised that such would be the practice on various other projects, it is fair to assume that the whole appropriation for subjugation should be regarded as a construction item.

It is true that when the Leavitt Act was passed, it was not the practice to subjugate land for Indians, and such work would, therefore, not have been a construction cost. But there is no reason to suppose that Congress intended to confine the term “construction cost” to those types of construction which were then included within the meaning of the term. As Justice Holmes once said, “A word is not a crystal, transparent and unchanged.”<sup>10</sup> The Leavitt Act was intended to defer the repayment of construction costs which should occur in the future. Since the act was to have a prospective operation, it is only reasonable to suppose that the concept of “construction” should not be regarded as immutable and unchanging. It must be realized that to a certain extent the distinction between “construction costs” and other types of costs such as “operation and maintenance” costs, or “repair and rehabilitation” costs is conventional and artificial, and even arbitrary. It seems to be the practice during the period of construction of irrigation projects to carry even operation and maintenance charges into construction costs,<sup>11</sup> and legislation governing the Flathead irrigation project, for instance, has expressly provided for covering operation and maintenance charges into construction costs.<sup>12</sup> It would be wholly unprofitable to debate as a general question whether in the nature of things the construction of a drainage ditch is to be regarded as a “construction cost” rather

<sup>8</sup> The appropriations were also for other purposes, but these are clearly irrelevant since they were for “the purchase or rental of equipment, tools, and appliances; for the acquisition of rights-of-way, and payment of damages in connection with such irrigation systems; for the development of domestic and stock water and water for subsistence gardens; for the purchase of water rights, ditches, and lands needed for such projects; and for drainage and protection of irrigable lands from damage by floods or loss of water rights.”

<sup>9</sup> See a statement to this effect in House Hearings on Interior Department Appropriation Bill, 1942, p. 275.

<sup>10</sup> *Towne v. Eisner*, 245 U. S. 418, 425 (1918).

<sup>11</sup> See the statement to this effect in House Hearings on Interior Department Appropriation Bill, 1939, p. 246.

<sup>12</sup> See acts of March 7, 1928 (45 Stat. 200, 213); April 22, 1932 (47 Stat. 91, 101); and May 9, 1935 (49 Stat. 176, 188).

than an "operation and maintenance" charge. The answer to such a question must depend upon the circumstances of the particular case in the light of applicable legislation.

It has been pointed out that this office raised the question some time ago<sup>13</sup> whether there was authority under section 1 of the act of June 22, 1936 (49 Stat. 1803; 25 U. S. C. sec. 389), which is the non-Indian analogue to the Leavitt Act, to cancel the charges arising from inadequate drainage facilities. But this doubt arose only by reason of the fact that section 2 of the same act, which permitted lands to be declared temporarily nonirrigable, expressly referred to a lack of proper drainage facilities. In other words, it arose by reason of the particular provisions of the act. There certainly was no intention to consider, let alone decide, the abstract question whether the cost of drainage facilities could be regarded as a construction cost.

Attention has been called to the provision of the act of June 22, 1936 (49 Stat. 1757, 1772), which is the Appropriation Act for the fiscal year 1937, making specific provision for land subjugation in the expenditure of certain funds. Thus it was provided, "That when necessary the foregoing amounts may be used for subjugating lands for which irrigation facilities are being developed." This provision was dropped the following year with the explanation that it had been inserted because subjugation work is "especially desirable in the development of garden tracts" but that it was no longer necessary in view of the omission of any funds for the development of garden tracts.<sup>14</sup> In point of fact, an appropriation of \$60,000 for the development of garden tracts was subsequently suggested to the Senate Subcommittee<sup>15</sup> and enacted.<sup>16</sup> But this change of plan does not affect the validity of the explanation nor would it be affected even by the fact that it was logically wrong and unpersuasive. The mere fact that the explanation was made establishes that the abandonment of the express provision was not intended to terminate the appropriation of funds for subjugation as part of the construction cost. Moreover, all the appropriations for the development of garden tracts were expressly made nonreimbursable.<sup>17</sup> Ever since the fiscal year 1938, the

<sup>13</sup> Memorandum Sol., I. D., March 30, 1943.

<sup>14</sup> See House Hearings on Interior Department Appropriation Bill, 1938, p. 1063.

<sup>15</sup> See Senate Hearings on Interior Department Appropriation Bill, 1938, p. 245.

<sup>16</sup> See act of August 9, 1937 (50 Stat. 564, 580).

<sup>17</sup> Thus the relevant provision of the act of June 22, 1936, reads in its entirety:

"\* \* \* That when necessary the foregoing amounts may be used for subjugating lands for which irrigation facilities are being developed: *Provided further, That the cost of the foregoing irrigation projects and of operating and maintaining such projects where reimbursement thereof is required by law, but not including the cost of domestic and stock water projects and of projects for the development of water for garden tracts, shall be apportioned on a per-acre basis against the lands under the respective projects* \* \* \*." [Italics supplied.]

The \$60,000 item in the act of August 9, 1937, was also made nonreimbursable.

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Appropriation Acts have also carried an appropriation for "continuing subjugation and for cropping operations on the lands of the Pima Indians in Arizona." But this appropriation is made in connection with the conduct of a tribal pasturing enterprise<sup>18</sup> from the proceeds of the enterprise, and thus represents an appropriation of tribal funds. The Leavitt Act, however, has no application to tribal funds. In any event, it does not seem to me that the omission of an express provision once made with reference to subjugation is decisive. As I have indicated, such omission may occur because of various reasons, including inadvertence, and even the mistaken conviction that it was no longer necessary. Common designs are not to be attributed to diverse Congresses.

The reason for subjugating Indian lands as part of the construction of an Indian irrigation project was excellently stated during the Hearings on the Interior Department Appropriation Bill for 1941 in explaining an item for subjugation work on Navajo lands, but it is equally applicable to any Indian lands. The statement is as follows:<sup>19</sup>

Subjugation of Indian lands by the Government is necessary for many reasons. The Indian as a rule does not have the money or equipment with which to do this work, nor is he skilled in this specialized field. In many instances in the past his land has been placed under constructed works without subjugation, and his attempts to irrigate raw land that is rough, without properly located farm ditches and structures necessary to control the water, has resulted in failure. In many places the low ground is drowned trying to force water onto the high spots. This has resulted in the waterlogging of large areas, making them unfit for future cultivation, and the crops on the high spots do not mature due to lack of water. The Indian farmer has become discouraged, and as a result full benefits from the utilization of the project have never been realized.

In order that the Indians can place their lands under cultivation and mature crops where irrigation is necessary, it is necessary to subjugate areas according to the available water supply. This work includes clearing, leveling, and construction of farm ditches and the necessary structures.

In concluding the discussion of the problem, I think it is necessary, however, to enter a caveat. While I have little reason to suppose that appropriations obtained for subjugation work on other Indian projects do not represent construction costs that are also deferrable under the Leavitt Act, it follows from what I have said that this may not always and invariably be true, and hence I do not wish to be understood as deciding actually more than the precise question that has been submitted to me which relates to the Salt River project. I should emphasize, too, the importance of restricting subjugation work to exclu-

<sup>18</sup> The nature of this enterprise is explained in some detail in House Hearings on Interior Department Appropriation Bill, 1938, p. 1031.

<sup>19</sup> Part II, p. 275.

sively Indian projects, so long as such work is undertaken only on behalf of Indians. In the case of mixed projects, it would not be possible to justify subjugation work for Indians that would not also be undertaken for non-Indians. Since existing law contains the general provision that construction costs must be prorated on an equal per-acre basis against all the lands of a project, it would be obviously inequitable to perform subjugation work for Indian landowners that was not also performed for non-Indian landowners. Even in the case of a wholly Indian project, the same amount of subjugation work would not be required on every parcel of land, but the resulting inequities would be rather slight, and the individual Indian would have no cause to complain in view of the deferment provision of the Leavitt Act.

I note that in the Indian Office letter of June 2, the Superintendent of the Pima Agency is instructed that he is authorized to proceed with the subjugation work without obtaining the consent of absent owners, or if there is other adequate reason for dispensing with the consent of the owners. I am not taking exception to this instruction in view of the long-standing practice of performing irrigation construction work on Indian reservations without obtaining the consent of the Indians.<sup>20</sup> I am not, however, expressing any opinion at this time as to the legality of any debt or lien in the case of a nonconsenting landowner. You may therefore wish to modify the proposed direction contained in your letter to Superintendent Robinson, authorizing him to proceed with subjugation work without obtaining consent of landowners, so as to permit consideration of the legal consequences of such action if it appears necessary.

FOWLER HARPER,  
*Solicitor.*

### INVENTION OF ELECTRIC PENCIL MACHINE

#### Order No. 1763—Circumstances Surrounding Invention—Act of March 3, 1883, as Amended.

An invention conceived during working hours is not required to be assigned to the Government if the inventor's duties do not include research or investigation, and the invention was developed on the inventor's own time, using his own materials.

A certificate of public interest under the act of March 3, 1883, as amended (35 U. S. C. sec. 45), is proper with respect to an Electric Pencil Machine which may be used by Government draftsmen.

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<sup>20</sup> See Op. Sol., M. 14051, November 17, 1924.

*August 21, 1945*

M-34192

AUGUST 21, 1945.

## THE SECRETARY OF THE INTERIOR.

MY DEAR MR. SECRETARY: My opinion has been requested concerning the relative rights of the Government and the inventor in an Electric Pencil Machine invented by Haden R. Irick, an engineering draftsman employed by the Grazing Service at Phoenix, Arizona.

Mr. Irick's undated invention report is accompanied by a memorandum from the Acting Director of the Grazing Service, dated July 4, 1945. The invention report, to which is attached a copy of Mr. Irick's job sheet, indicates that Mr. Irick's duties as engineering draftsman do not include research or investigation. Therefore the first ground upon which an invention is required to be assigned to the Government under Departmental Order No. 1763 of November 17, 1942, is not applicable.

An assignment may also be required under the order "whenever the invention was in substantial degree made or developed: through the use of Government facilities or financing, or on Government time, or through the aid of Government information not available to the public." Mr. Irick states that although his device was conceived during working hours, it was worked out and designed in his home, using only his own materials. The mere conception of an invention by an employee whose duties do not include research or investigation on Government time does not require the assignment of the invention. Since the development of the invention took place on the inventor's own time, with the use of his own materials, assignment to the Government is not required by the circumstances of its development.

The memorandum from the Acting Director indicates that the invention is liable to be used in the public interest, even though such use to the Grazing Service might be limited. Accordingly, a certificate of public interest, enabling the inventor to prosecute his patent application free of Patent Office fees, under the act of March 3, 1883, as amended (35 U. S. C. sec. 45), is proper. In return therefor, the Government will be entitled to the manufacture or use of the invention by or for the Government for governmental purposes without the payment of royalties.

FOWLER HARPER,  
*Solicitor.*

Approved:

MICHAEL W. STRAUS,  
*Assistant Secretary.*

**AUTHORITY OF COMMISSIONER OF THE GENERAL LAND OFFICE  
TO ISSUE PATENTS IN FEE COVERING INDIAN ALLOTMENTS  
WITH RESERVATIONS OF THE MINERALS UNDERLYING THE  
ALLOTMENTS IN FAVOR OF THE INDIAN OWNERS**

**Sale of Indian Allotments—Patents in Fee—Reservations of Minerals.**

The Secretary of the Interior is authorized to sell the allotted lands of deceased Indians by the act of June 25, 1910 (36 Stat. 855), as amended (25 U. S. C. secs. 372, 373).

The Secretary of the Interior may sell such allotments without the consent of the heirs or devisees, under such rules and regulations and upon such terms as he may prescribe.

The authority of the Secretary of the Interior to cause the entire allotment of a deceased Indian to be conveyed by patent necessarily includes the authority to cause a lesser interest therein, the surface only, to be conveyed by patent. Upon payment of the purchase price, the Secretary of the Interior may direct the Commissioner of the General Land Office to issue patents in fee to the purchasers of the lands, such patents to contain reservations of the minerals in favor of the heirs or devisees of the deceased allottees.

M-33967

AUGUST 29, 1945.

**THE SECRETARY OF THE INTERIOR.**

MY DEAR MR. SECRETARY: For the past several years the State of New Mexico has been attempting to acquire certain allotted Indian lands within that State. It is my understanding that the lands sought to be acquired will eventually be turned over to the National Park Service for inclusion in the proposed Manuelito National Monument near Gallup, New Mexico.

The Office of Indian Affairs has insisted that, for the protection of the Indians, any minerals underlying the allotments be reserved to the Indian owners. In all, 11 Indian allotments are involved, and on May 21, 1941, deeds conveying portions of 9 of the allotments to the State, with mineral reservations in favor of the Indian owners, were approved. The owners of the other 2 allotments—that of Attsidi Tsossini Biye and Bitanitso-n-Biye—first refused to sell but later reconsidered and executed deeds conveying portions of each allotment to the State. These deeds were not presented for departmental approval because of certain technical deficiencies. They were returned to the Superintendent of the Navajo Agency on August 29, 1942. In addition to the technical deficiencies in the execution of the deeds, attention was called to the fact that, while one of the deeds contained a mineral reservation in favor of the grantors, the other did not. Since the return of the deeds to the Agency, certain of the original grantors have died and their heirs have not yet been determined. Other parties owning undivided interests in the allotments are reported to be work-

*August 29, 1945*

ing in California and to date their signatures on the corrected and amended deeds have not been obtained.

Because conveyance by the State to the United States of other land for the National Monument project is being delayed by the difficulty in obtaining completed and satisfactory deeds covering these two allotments, the Office of Indian Affairs has requested my opinion as to whether fee patents for the lands involved may be issued to the State, reserving to the Indians the mineral rights now owned by them.

For the reasons hereinafter stated, it is my opinion that, should you deem it advisable administratively, you may cause patents to be issued to the State of New Mexico for the desired portions of these two allotments, reserving to the Indians the minerals underlying the lands sold to the State.

Both of the allotments are in an heirship status. Section 1 of the act of June 25, 1910 (36 Stat. 855), as amended (25 U. S. C. sec. 372), the statute governing the sale of restricted heirship lands by the Secretary of the Interior, provides:

That when any Indian to whom an allotment of land has been made, or may hereafter be made, dies before the expiration of the trust period and before the issuance of a fee simple patent, without having made a will disposing of said allotment as hereinafter provided, the Secretary of the Interior, upon notice and hearing, under such rules as he may prescribe, shall ascertain the legal heirs of such decedent, and his decision thereon shall be final and conclusive. If the Secretary of the Interior decides the heir or heirs of such decedent competent to manage their own affairs, he shall issue to such heir or heirs a patent in fee for the allotment of such decedent; if he shall decide one or more of the heirs to be incompetent, he may, in his discretion, cause such lands to be sold: *Provided*, That if the Secretary of the Interior shall find that the lands of the decedent are capable of partition to the advantage of the heirs, he may cause the shares of such as are competent, upon their petition, to be set aside and patents in fee to be issued to them therefor. All sales of lands allotted to Indians authorized by this or any other Act shall be made under such rules and regulations and upon such terms as the Secretary of the Interior may prescribe, and he shall require a deposit of 10 per centum of the purchase price at the time of the sale. \* \* \* Upon payment of the purchase price in full, the Secretary of the Interior shall cause to be issued to the purchaser patent in fee for such land: \* \* \*

Section 2 of that act, as amended (25 U. S. C. sec. 373), authorizes any Indian 21 years of age having any right, title, or interest in any allotment held in trust to dispose of such allotment by will, subject to the approval of the Secretary of the Interior. However, "the approval of the will and the death of the testator shall not operate to terminate the trust or restrictive period, but the Secretary of the Interior may, in his discretion, cause the lands to be sold."

That statute has been construed by this office, in a memorandum to the Commissioner of Indian Affairs of August 14, 1937, as author-

izing the Secretary of the Interior to sell a decedent's estate for the benefit of heirs without requiring the consent of the heirs or any number of them to validate the transaction. The act authorizes sales to be made under such rules and regulations as the Secretary of the Interior may prescribe and, except for the requirement of a 10 percent deposit at the time of the sale, the statute authorizes the sale upon such terms as the Secretary may prescribe. All details of the sale are left to the discretion of the Secretary. The Attorney General has said that it would be difficult to conceive of a broader authority than this statute confers (33 Op. Atty. Gen. 25).

There is no requirement that the entire interest in any allotment shall be sold. If 40 or 80 acres of a 160-acre allotment can be sold, patent therefor issued to the purchaser, and the balance retained in trust for the Indians, it is difficult to see why the surface only cannot be patented and the minerals underlying the surface retained in trust for the Indians. The authority of the Secretary of the Interior to cause the entire allotment of a deceased Indian to be conveyed by patent necessarily includes the authority to cause a lesser interest therein, namely the surface only, to be conveyed by patent. *Of. United States v. Gypsy Oil Co.*, 10 F. (2d) 487 (C. C. A. 8th, 1925); *Terrell v. Scott et al.*, 262 Pac. 1071 (Okla., 1928), *cert. denied* 277 U. S. 596.

The allotments involved were made pursuant to section 4 of the General Allotment Act of February 8, 1887 (24 Stat. 388), as amended (25 U. S. C. secs. 334 and 336). The patent to Bitanitso-n-Biye was issued on March 29, 1920. It contained a reservation of all coal in the land to the United States pursuant to the act of March 3, 1909 (35 Stat. 844; 30 U. S. C. sec. 81). However, it is my understanding that the lands covered by the patent were classified as noncoal on September 13, 1921. The act of April 14, 1914 (38 Stat. 335; 30 U. S. C. sec. 82), authorizes and directs the Secretary of the Interior, in cases where patents for public lands have been issued under the terms of the act of March 3, 1909, *supra*, and where the lands so patented are subsequently classified as noncoal in character, to issue new or supplemental patents without the reservation of the coal to the United States. Application by the patentee for a corrected patent is not necessary. The regulations of the Department require the General Land Office to issue new patents with as much expedition as may be possible (43 CFR 108.5). There is nothing in the attached file of the General Land Office to indicate that a new patent, without the reservation, was ever issued to the allottee or his heirs. If I am correct in my assumption that a new patent has never been issued, the General Land Office should be directed to take appropriate steps to remedy the situation.

If, in the exercise of your discretion, you deem it advisable to sell to the State of New Mexico portions of the two allotments in question, I



September 6, 1945

can see no legal objection to your directing the Commissioner of the General Land Office, upon the payment of the agreed purchase price by the State, to issue patents to the State of New Mexico for the requested portions of the allotments with reservations in the patents of all underlying minerals to the heirs or devisees of the allottees.

FOWLER HARPER,  
*Solicitor.*

Approved:

OSCAR L. CHAPMAN,  
*Assistant Secretary.*

**THE REQUIREMENT OF ANCILLARY ADMINISTRATION IN OKLAHOMA TO ESTABLISH THE TITLE TO OSAGE HEADRIGHTS OF HEIRS OR BENEFICIARIES OF DECEASED NON-INDIANS, DOMICILED AT THE TIME OF THEIR DEATH IN A STATE OTHER THAN OKLAHOMA**

**Osage Headrights—Decedents' Estates and Ancillary Administration.**

An Osage headright, owned by a non-Indian, represents the non-Indian's right to participate in the distribution of the bonuses and royalties accruing from the mineral estate owned by the Osage Tribe.

The right to receive the payments accruing to an Osage headright, after they have been segregated from the tribal funds, is analogous to any debt due from the United States.

The payments accruing to the headright have no situs in Oklahoma.

Ancillary administration in Oklahoma of the estate of a deceased non-Indian owner of an Osage headright is unnecessary.

The Secretary of the Interior may recognize a decree of a court of competent jurisdiction of the State of domicile of a non-Indian owner of an Osage headright as vesting title to the headright in the heirs or beneficiaries under a will found by that court to be entitled thereto.

The payments accruing after the death of the non-Indian owner and during the course of administration of his estate should be paid to the administrator or executor duly appointed and qualified under the laws of the State of domicile.

M-33564

SEPTEMBER 6, 1945.

**THE SECRETARY OF THE INTERIOR.**

MY DEAR MR. SECRETARY: You have referred to me for an opinion the question of whether ancillary administration in Oklahoma must be required in order to pass good title to an interest in an Osage headright owned by a non-Indian domiciled at the time of his death in a State other than Oklahoma.

The question arises in connection with the administration of the estate of George B. Mathews, a white man, who at the time of his

death owned a one-sixth interest in an Osage headright assigned to him by Frank M. Keane. Keane acquired his interest by assignment from Remington Rogers who acquired it, also by assignment, from C. O. Durrett, who inherited the interest from his deceased wife, Clementine Roussin Durrett, Osage allottee No. 1640. All of the assignors were white men and the assignments were approved by the Secretary of the Interior under the provisions of the act of April 12, 1924 (43 Stat. 94).<sup>1</sup> Mr. Mathews died testate. His estate is being administered according to the laws of New York, the State of his domicile.

In my opinion, ancillary administration in Oklahoma is unnecessary to effect transfer of the title to an interest in an Osage headright owned by a non-Indian. An Osage headright, owned by a non-Indian, represents the non-Indian's right to participate in the distribution of the bonuses and royalties arising from the mineral estate owned by the Osage Tribe.

The act of June 28, 1906 (34 Stat. 539), provided that the surface of the lands belonging to the Osage Tribe of Indians should be divided among the individual members of the tribe, according to a roll authorized to be made by that act.<sup>2</sup> After directing the manner in which the lands should be allotted, Congress reserved the oil and gas and other minerals underlying the Osage lands to the use of the Osage Tribe for a stated period, the royalties thereon to be paid to the tribe.<sup>3</sup> It further directed that all funds of the tribe should be segregated as soon as practicable after January 1, 1907, and placed to the credit of the individual members of the Osage Tribe on a basis of a pro rata division among the members of said tribe or their heirs, said credit to draw interest, which interest was directed to be paid quarterly to the members entitled thereto.<sup>4</sup> Congress further directed that the royalty received from the oil, gas, coal, and other mineral leases should be placed in the Treasury of the United States and be distributed to the individual members of the tribe, in the manner and at the same time that payments were made of interest on the moneys held in trust for the Osages by the United States.<sup>5</sup>

The period of tribal ownership of the minerals has been extended from time to time by act of Congress. The act of June 24, 1938 (52

<sup>1</sup> "That any right to or interest in the lands, money, or mineral interests, as provided in the Act of Congress approved June 28, 1906 (Thirty-fourth Statutes at Large, page 539), entitled 'An Act for the division of the lands and funds of the Osage Indians in Oklahoma, and for other purposes,' and in Acts amendatory thereof and supplemental thereto, vested in, determined, or adjudged to be the right or property of any person not an Indian by blood, may with the approval of the Secretary of the Interior and not otherwise be sold, assigned, and transferred under such rules and regulations as the Secretary of the Interior may prescribe."

<sup>2</sup> The Osage Tribe of Indians v. The United States, 102 Ct. Cl. 545 (1944).

<sup>3</sup> Section 3.

<sup>4</sup> Subsection 1 of section 4.

<sup>5</sup> Subsection 2 of section 4.

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Stat. 1034), extends the tribe's interest in the mineral estate to April 8, 1983 "unless otherwise provided by Act of Congress," and provides that "all royalties and bonuses arising therefrom shall belong to the Osage Tribe of Indians, and shall be disbursed to members of the Osage Tribe or their heirs or assigns as now provided by law."<sup>6</sup>

The heirs of Osage Indians are determined by the county courts of Oklahoma according to the laws of Oklahoma<sup>7</sup> and their wills, when approved by the Secretary of the Interior,<sup>8</sup> are likewise probated in the county courts of Oklahoma. Many heirs and devisees of the Osage Indians have been persons of no Indian blood and in this manner they have succeeded to the right to share in the distribution of the income from the tribal mineral estate.

This right does not, however, give such persons any interest in the minerals. Title to the minerals is now in the Osage Tribe.<sup>9</sup> Title will remain in the tribe until Congress directs otherwise.<sup>10</sup>

It would be futile to speculate as to what disposition Congress will ultimately make of this mineral estate. It may be that Congress will determine that title to the minerals shall vest in those persons who may happen to be the owners of the allotted lands at the expiration of the trust period;<sup>11</sup> that title shall vest in the original allottees or their heirs;<sup>12</sup> or that title shall vest in those persons who are members of the Osage Tribe when the tribal estate terminates. It seems obvious from the fact that the minerals have been retained in communal ownership for so much longer than originally contemplated that Congress will not individualize the mineral estate so long as it produces a substantial source of income to the members of the tribe.

<sup>6</sup> Section 3.

<sup>7</sup> Section 6 of the act of June 28, 1906 (34 Stat. 539), and section 3 of the act of April 18, 1912 (37 Stat. 86).

<sup>8</sup> Section 8 of the act of April 18, 1912 (37 Stat. 86).

<sup>9</sup> The Osage Tribe of Indians v. The United States, 102 Ct. Cl. 545 (1944), cited *supra*, footnote 2.

<sup>10</sup> Adams et al. v. Osage Tribe of Indians et al., 59 F. (2d) 653 (C. C. A. 10th, 1932), cert. denied 287 U. S. 652.

<sup>11</sup> See section 2 (7) of the act of June 28, 1906 (34 Stat. 539), where, after authorizing the granting of certificates of competency permitting adult Indians to sell certain of their allotted lands, Congress provided:

"\* \* \* That nothing herein shall authorize the sale of the oil, gas, coal, or other minerals covered by said lands, said minerals being reserved to the use of the tribe for a period of twenty-five years, and the royalty to be paid to said tribe as hereinafter provided: And provided further, That the oil, gas, coal, and other minerals upon said allotted lands shall become the property of the individual owner of said land at the expiration of said twenty-five years, unless otherwise provided for by Act of Congress."

<sup>12</sup> See section 5 of the act of June 28, 1906, *supra*:

"That at the expiration of the period of twenty-five years from and after the first day of January, nineteen hundred and seven, the lands, mineral interests, and moneys, herein provided for and held in trust by the United States shall be the absolute property of the individual members of the Osage tribe, according to the roll herein provided for, or their heirs, as herein provided, and deeds to said lands shall be issued to said members, or to their heirs, as herein provided, and said moneys shall be distributed to said members, or to their heirs, as herein provided, and said members shall have full control of said lands, moneys, and mineral interests, except as hereinbefore provided."

In any event, those persons who now have the right to share in the income of the tribe from its mineral estate have nothing more than a hope that they may some day share in the distribution of the minerals.

The right which those persons now have is the right to receive money—a right to personality. That right may, as indicated above, be terminated at any time by Congress, but until it is terminated it should be treated as any other right to personal property.

The right to share in the Osage tribal income has always been transmissible through descent or devise. However, since no specific provision of law authorized the sale or transfer of the right in any other manner, the Solicitor for this Department, in 1924, expressed grave doubt that the Department would be justified in recognizing assignments of prospective distributive shares in these tribal funds by persons of other than Indian blood.<sup>13</sup> Thereafter, the act of April 12, 1924, *supra*, was passed. That act, in my opinion, has no bearing on the present question as it was evidently intended to apply to transfers *inter vivos* only.

It has been suggested that because the Osage mineral estate is located in Osage County, Oklahoma, and because the headright income is derived in Osage County and distributed through the Indian Agency in Osage County, the Oklahoma courts must determine who is entitled to succeed to the interest of a deceased non-Indian owner of an Osage headright. In my opinion, none of these factors is material.

The fact that the minerals are located in the State of Oklahoma does not give the courts of that State jurisdiction over them. Congress is the only agency which can vest the courts of Oklahoma with jurisdiction over the tribal property, and this Congress has not done.<sup>14</sup>

Neither does the fact that the income from the mineral estate is derived and distributed in Osage County give the courts of Oklahoma jurisdiction to determine who shall be entitled to receive that income. The income itself belongs to the tribe. When it is received it is placed in the Treasury of the United States, and the individual interest of the owner of the headright does not vest until the Secretary of the Interior has segregated the pro rata share of the individual from the tribal funds.<sup>15</sup> The segregation is made in Washington, and the distribution of the checks to the individual owners could very well be made here. The fact that, for the purposes of administrative expediency, the disbursement is made in Oklahoma is not sufficient to re-

<sup>13</sup> Opinion of March 12, 1924, M. 9541.

<sup>14</sup> The Supreme Court of Oklahoma has recently reiterated its former holdings that it has no jurisdiction over the tribal property of the Osage Indians. *Mashunkashey v. Mashunkashey*, 134 P. (2d) 976 (1942).

<sup>15</sup> Memorandum for the Commissioner of Indian Affairs, April 1, 1943, relating to the estate of Frances Brunt (58 I. D. 378).

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quire ancillary administration in Oklahoma to determine who shall succeed to the right of a non-Indian domiciled elsewhere.

The right of a non-Indian to receive the payments due him, after the amounts thereof have been segregated, is analogous to the right of any creditor of the United States. The duty of the Secretary with respect to these payments is purely the ministerial one of making them to the persons entitled thereto. He must satisfy himself that those persons asserting the right to receive the payments are lawfully entitled thereto.

Upon the death of a non-Indian owner of an interest in an Osage headright, the right of his estate to receive the payments is the same as the right of the estate of any other creditor of the United States. It is a well-established principle that—

The debts due from the government of the United States have no locality at the seat of government. The United States, in their sovereign capacity, have no particular place of domicile, but possess, in contemplation of law, an ubiquity throughout the Union; and the debts due by them are not to be treated like the debts of a private debtor, which constitute local assets in his own domicile. On the contrary, the administrator of a creditor of the government, duly appointed in the State where he was domiciled at the time of his death, has full authority to receive payment and give a full discharge of the debt due to his intestate, in any place where the government may choose to pay it.<sup>16</sup>

Under the above-mentioned rule, the requirement of ancillary administration in Oklahoma would be unnecessary.

The Department has always recognized a final decree of distribution of the court of the State of domicile of a non-Indian owner of an Osage headright interest having jurisdiction over the decedent's estate as vesting in the heirs or beneficiaries under the will of the deceased non-Indian the right to receive payments accruing to the headright interest. It has made payment of all subsequent income from the headright interest to those persons found to be entitled thereto by the court of the domiciliary State upon presentation to it of a certified copy of the final decree.

In my opinion, if the Secretary is convinced by the evidence presented to him that the headright interest is lawfully vested in the heirs or legatees of the decedent under a decree of a court of competent jurisdiction of the domiciliary State, he may recognize that decree as vesting title in those persons, and he need not require ancillary administration of the estate by the Oklahoma courts.

The payments accruing after the death of a non-Indian owner and during the course of administration of his estate should be paid to

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<sup>16</sup> *Vaughan v. Northup*, 15 Pet. 1, 6 (1841); *Mackey v. Cox*, 18 How. 100, 105 (1855); *Wyman v. Halstead*, 109 U. S. 654, 657 (1884).

the duly appointed and qualified administrator or executor, in accordance with the accepted practice of the General Accounting Office<sup>17</sup> and of this Department.<sup>18</sup>

Certain attorneys interested in the estate of George B. Mathews have indicated that the estate cannot be closed until the conclusion of certain litigation in which Mr. Mathews was involved at the time of his death. They state that the estate is heavily indebted, and they request to be advised whether the executrix can sell the headright interest while the estate is pending administration in New York in the same way in which she can sell other assets of the estate under the laws of the State of New York.

While I express no opinion as to the right of an executrix of an estate, pending administration in the State of New York, to sell the assets of that estate, I can see no legal objection to the approval by the Department of such a sale, if made in accordance with the laws of that State. If you, as Secretary of the Interior, are convinced by the evidence presented at the time approval is sought that the headright interest was sold pursuant to the New York law, I believe that you may approve the sale pursuant to the act of April 12, 1924, *supra*, and thus give the sale validity.

FOWLER HARPER,  
*Solicitor.*

Approved:

OSCAR L. CHAPMAN,  
*Assistant Secretary.*

TOLLEF N. IVERSON  
JENS J. HAUGE

A-24130

*Decided October 3, 1945*

#### Public Sale—Preference Right of Adjoining Owner.

A preference right at a public sale is properly accorded to the owner of a life estate on adjoining property who applies as guardian on behalf of his minor children who own the remainder in fee in the adjoining land.

Ownership of a life estate in adjoining land is not sufficient to confer upon the life tenant a preference right in the purchase of land at a public sale.

<sup>17</sup> See 15 Comp. Gen. 236; 15 Comp. Gen. 441; 18 Comp. Gen. 716; 19 Comp. Gen. 987.

<sup>18</sup> See letter to the Superintendent of the Osage Agency approved on May 6, 1942, authorizing the Superintendent to pay the accrued and accruing income to the duly appointed executrix of the will of Worchester Bouck, a deceased non-Indian owner of a fractional interest in an Osage headright.

October 3, 1945

## APPEAL FROM THE GENERAL LAND OFFICE

By decision of the General Land Office, dated February 15, 1945, Jens J. Hauge was declared the highest bidder at the public sale of lot 1 of frl. NW $\frac{1}{4}$  sec. 15, T. 128 N., R. 42 W., 5th P. M., Minnesota, containing 0.45 acre, which decision was to become final 30 days from date.

On February 26, 1945, Tollef N. Iverson claimed a preference right to purchase the land offered for sale as an adjoining owner, and authorized that the bid of \$54, which he had previously made, be applied towards the purchase price. With his application he submitted a certificate by the register of deeds of Grant County, Minnesota, showing that Iverson had a life estate and his minor children fee title in lands adjoining the above-described lands as the result of a conveyance from Iverson and his wife. In his application, Iverson stated: "I suppose that you will issue the deed to all of my children as they are the owners in fee."

By decision of March 24, 1945, the General Land Office rejected the preference-right claim of Iverson on the ground that he had failed to show ownership of the whole title to contiguous land, as the title in fee to such land was not held by him.

An appeal from the decision was filed by Tollef N. Iverson, requesting grant of the preference right to buy the land at three times the appraised price. With the appeal there was submitted a certified copy of letters of guardianship issued by the probate court of Grant County, Minnesota, on April 11, 1945, by which Tollef N. Iverson was appointed guardian of his minor children. The appeal was signed by Iverson in his capacity both as owner of a life estate in the contiguous tract and as guardian of the estates of his minor children.

The 1934 amendment of section 2455, Revised Statutes, authorizing the sale of isolated tracts, created in express terms the preference right here in question. The pertinent portions of the provision read as follows:

\* \* \* *Provided*, That for a period of not less than thirty days after the highest bid has been received, any owner or owners of contiguous land shall have a preference right to buy the offered lands at such highest bid price, \* \* \* but in no case shall the adjacent land owner or owners be required to pay more than three times the appraised price: \* \* \*. [Rev. Stat. sec. 2455, as amended June 28, 1934, 48 Stat. 1274; 43 U. S. C. sec. 1171.]

See, also, 43 Code of Federal Regulations 250.20, which provides, in part:

\* \* \* Applications for such preference right must be supported by proof of the applicant's ownership of the whole title of the contiguous lands; that is, he must show by affidavit that he has the title in fee. \* \* \*

Tollef N. Iverson's life estate, in itself, was insufficient to meet the requirements of the statute, and the preference-right claim therefore could not be granted on the basis of the life estate. However, submission of the letters of guardianship, appointing Tollef N. Iverson guardian of the estates of his minor children who hold the fee title to the land, remedied the defect in the instant case. While the application of February 26, 1945, was submitted by Tollef N. Iverson without an express statement that he was applying as a guardian of his minor children, he was, nevertheless, clearly acting in the interest of his minor children, as is apparent from the above-quoted statement in his application that he "supposed" that the deed will be issued to his children "as they are the owners in fee." In view thereof, the subsequent appointment of Tollef N. Iverson as guardian for his minor children effected a substantial compliance with the requirement that applications be made by the owner of the whole title. It should be noted that prior to the appointment of a guardian there was no possibility for the minor children to make an effective application and that in the present case the application, though made by the owner of the legal life estate, nevertheless was made in the interest of the owners of the whole title. Under the particular facts of the case, the defect of the application, as originally made, must be considered as having been remedied by the subsequent appointment of Iverson as guardian for his minor children. *Cf. Elden F. Keith*, A. 23724, December 6, 1943; *James L. McCreath, Vera Lowe*, A. 23942, October 13, 1944; *Frank E. Scovil, Carl J. Niebuhr*, A. 24089, May 10, 1945 (all unreported).

Accordingly, the decision of the General Land Office, rejecting Iverson's preference-right claim and declaring that Hauge is entitled to the award of the land, is reversed and the case remanded to the General Land Office for further proceedings in accordance with this opinion.

OSCAR L. CHAPMAN,  
*Assistant Secretary.*

#### FRED BARTINE

A-23971

*Decided November 7, 1945*

#### Desert-Land Entry—Withdrawals.

The act of March 28, 1908, invites the occupancy and reclamation of unsurveyed desert lands, and acceptance of the invitation initiates an interest in the lands.

One who takes possession of unreserved, unsurveyed desert land, who begins to reclaim it, and who is continuing his reclamation operations at the date of the inclusion of the land within a withdrawal, has initiated a valid claim upon which the withdrawal does not operate. The claim may be asserted



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by the filing of a proper desert-land application as soon as the lands are surveyed, if at that time the claimant is in possession of the lands and is complying with the appropriate regulations.

The 90-day limitation in the act of March 28, 1908, giving a preference right of entry to qualified persons who performed certain acts on unsurveyed lands before they are surveyed, is intended for the protection of the right of desert-land claimants and homestead settlers as among themselves. In the absence of asserted adverse claims of desert-land reclamation or of homestead settlement, a desert-land claimant who, upon the filing of the plat of survey, fails to make timely assertion of his right of entry forfeits no rights and does not lose his lands because of a withdrawal not previously operative upon them.

#### APPEAL FROM THE GENERAL LAND OFFICE

Fred Bartine, of Eureka, Nevada, has appealed from a decision by the Commissioner of the General Land Office rejecting his application, Carson City 021704, for desert entry of certain Nevada lands. Bartine filed the application in question on September 27, 1943, for 320 acres described as follows:

T. 19 N., R. 50 E., M. D. M., Nevada,  
sec. 15,  $N\frac{1}{2}NW\frac{1}{4}$ ,  $NW\frac{1}{4}NE\frac{1}{4}$ ;  
sec. 16,  $SW\frac{1}{4}NW\frac{1}{4}$ ,  $N\frac{1}{2}NW\frac{1}{4}$ ,  $N\frac{1}{2}NE\frac{1}{4}$ .

Bartine also filed petition for classification of the lands under section 7 of the Taylor Grazing Act of June 28, 1934 (48 Stat. 1269), as amended by the act of June 26, 1936 (49 Stat. 1976; 43 U. S. C. sec. 315f).

The tracts sought were included within the general withdrawal of November 26, 1934 (Executive Order No. 6910), which temporarily withdrew from all forms of entry all the vacant, unreserved, and unappropriated public land in Nevada and 11 other States, reserving it for classification in accordance with its highest usefulness. They were also within the boundaries of a withdrawal made by the Secretary on November 24, 1937, effective on November 30, 1937, for a proposed grazing district under section 1 of said Taylor Act. Both withdrawals were made subject to existing valid rights and both are still in effect. The grazing district proposed in 1937, however, has not yet been established.

Field examination of the lands was directed, but on July 12, 1944, before a report was received, the Commissioner of the General Land Office held the application for rejection on the ground of the 1937 withdrawal. He stated, however, that this action was without prejudice to Bartine's right to apply for restoration of the land from the withdrawal and to file another desert-land application, but that favorable action upon such an application would not give Bartine any preference right of entry. As authority, he cited 47 L. D. 595, 597;

48 L. D. 184; and 49 L. D. 111. From this decision Bartine has appealed, alleging that the Commissioner has overlooked Bartine's declaration of settlement of the lands in 1930 and of his improvement and occupancy of them ever since.

The record shows that at the time of the alleged settlement these lands were unsurveyed; that they remained so until well after both withdrawals; and that when the plat of survey was finally filed Bartine was dilatory in applying for them. In these circumstances, determination as to whether Bartine initiated and retained any rights under the desert-land acts requires not only an analysis of the ascertainable facts but a review of the interpretations that have been made of the applicable acts regarding the initiation of rights under them.

Bartine's own statement of facts appears in his petition for classification. Therein he said that he had been a resident of Eureka County since his naturalization in 1912; that he had held possession of all the lands described for a period of about 12 years; and that during that time he had developed water on the lands by his own efforts and at his own expense. Most of the lands, he said, had been fenced and improved. The buildings, such as residence, stable, chicken house, and other outhouses, were located, he said, on *or near* the SW $\frac{1}{4}$ NW $\frac{1}{4}$  of sec. 16.

Bartine further alleged that the tracts sought are more valuable for the production of agricultural crops than for that of native grasses and forage plants, since in their native state they produce little but sagebrush, while with water they produce alfalfa, small grains, and garden vegetables. He said that the tracts are practically level and are all irrigable. He had tested the productivity of the soil and experimented with certain crops, reclaiming the land in sec. 16 by irrigation and tillage.

The water used, he said, comes from three artesian wells which he had drilled to an average depth of 375 feet and which together produce about 2 second-feet of water continuously without pumping. He described two of the wells as located in sec. 16, SW $\frac{1}{4}$ NW $\frac{1}{4}$ , and the third as being in sec. 17, NE $\frac{1}{4}$ SE $\frac{1}{4}$ . In his declaration he said that the three wells were included in his Nevada application, No. 9682, to appropriate the waters. This water he believed sufficient for all the tracts sought. The contour of the lands, he said, admitted of irrigation of any and all parts of the land from these wells by means of ditches and laterals. He referred to a map or plat accompanying the petition as indicating the irrigation plan proposed, but no such plat appears to have been attached to his papers.

In addition, Bartine stated that he had included some of these lands in an earlier application, one for homestead entry, which had

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been "canceled,"<sup>1</sup> and still later had included them all in Carson City 020915, an application of July 3, 1940, for 640 acres under the Pittman Act of October 22, 1919 (41 Stat. 293; 43 U. S. C. secs. 351-355, 357-360). The latter application, he showed, covered forties in secs. 9 and 17, as well as those here sought in secs. 15 and 16. It was rejected on December 8, 1942, he said, because water already existed upon some of the tracts.

In acting upon the instant desert-land application, the Commissioner called upon the Geological Survey and the Grazing Service for possible objections to its allowance. In addition, as stated above, he directed investigation by the Branch of Field Examination, this having been recommended by the Land Classification Division, which desired evidence as to the adaptability of the land to sustained cultivation under irrigation and specific information as to the amount and permanency of the water supply from the artesian wells mentioned.

In response, the Geological Survey reported these lands as having no water-power or reservoir possibilities and no value for minerals, according to available records; and the Grazing Service likewise found no objection to allowance of the application. Its Acting Director reported that the land is all level and cultivable; that about 45 acres are cultivated to alfalfa, annually producing 2 tons to the acre; that there are 160 acres of good grazing land, consisting of alfalfa and rye-grass pasture; that the cultivated land is irrigated from three artesian wells flowing 1,000 gallons a minute and that all the land can be irrigated from these wells; and that the improvements on the land have a value of \$17,000. He considered the land suitable for classification under the desert-land law. The district grazier submitted a land-status sheet showing the location of the wells, reservoirs, ditches, cultivated fields, fences, and buildings, and said, "Mr. Bartine has farmed this area for the past twelve years. It has proved to be successful from an agricultural standpoint." The grazier's report contained no information concerning applicant's water right nor any details of his irrigation plan.

Without further information from the field, the Commissioner, on July 12, 1944, on the ground of the withdrawal, took the adverse action described above. He not only held the application for rejection but ruled that Bartine would have no preference right of entry upon

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<sup>1</sup> Bartine doubtless here refers to Carson City 020283, his application of May 24, 1937, for enlarged homestead entry of six forties in sec. 16 and two forties in sec. 17. This was *rejected*, not "canceled," on the ground that the lands were unsurveyed and not all contiguous. It is to be noted that an additional reason for rejection might have been stated, namely, that on the face of the application the lands were irrigable and therefore not subject to enlarged homestead entry.

restoration of the lands to the public domain even should that result from his own motion therefor.

The authorities which he cited for the latter ruling were instructions and decisions setting forth rules concerning rights to lands withdrawn for water-power reserves under section 24 of the Federal Water Power Act of June 10, 1920 (41 Stat. 1063, 1075; 16 U. S. C. sec. 818 and Supp.), and to *lands restored from such withdrawals*.<sup>2</sup> The rule stated in 47 L. D. 597 appears also in 43 Code of Federal Regulations, section 103.6, and reads as follows:

103.6 Rights to withdrawn lands which may be recognized. Withdrawn public lands are not subject to lease, or other disposition, other than such as is specifically recognized by the Federal Power Act and there is no way to acquire preference rights, preferential treatment, or equitable or legal preference, *excepting where legal or equitable rights were acquired before the withdrawal of the land* \* \* \*. [Italics supplied.]

The section goes on to say, "in all cases where such rights are claimed, careful investigation as to its bona fides will be made." The two other references show that upon restoration of lands from power-reserve withdrawals no preference rights are accorded except where there are (1) prior valid settlement rights, (2) preference rights conferred by existing laws, or (3) equitable claims subject to allowance and confirmation.

It is to be noted that despite the recognition accorded by these rules to prior rights and despite Bartine's declaration of 1943 that he had been in possession of the lands for 12 years, or since 1931, the Commissioner did not investigate the good faith of Bartine's claim (43 CFR 103.6, *supra*). Nor did his decision inquire whether the alleged possession gave Bartine any rights as against the *regular* procedure regarding withdrawn, reserved, or unsurveyed lands upon their becoming open to disposal.<sup>3</sup>

From this decision Bartine appealed, as above stated. Of the grounds set forth, the only one requiring consideration here is the declaration that Bartine settled the described lands during 1930, has held possession of them continuously ever since, has made valuable improvements upon them, and has developed water sufficient to irrigate most of the tracts sought. Implicitly this, like the petition of classification, presents a claim antedating both the withdrawals mentioned above. Question arises, therefore, both as to whether Bartine's

<sup>2</sup> The lands here involved were never in any water-power reserve. The procedure in restorations from ordinary withdrawals, such as those here, and in cases where unsurveyed lands become subject to disposition is described in 43 CFR 295.8. See, also, 43 CFR 181.36-181.40 (Circ. 1588, December 7, 1944) under act of September 27, 1944 (58 Stat. 747), re Veterans of World War II. See, also, General Land Office Order No. 158, approved January 7, 1944.

<sup>3</sup> 43 CFR 295.8, cited in footnote 2, *supra*.

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alleged acts actually occurred either in 1930 or at any other date prior to the withdrawal of 1934, and also as to whether those acts meet the terms of the law and give Bartine any right that would except the lands from the withdrawal and from any prohibitive general procedural rules.

The chief statute controlling such cases is the desert-land act of March 3, 1877 (19 Stat. 377), as amended by the act of March 28, 1908 (35 Stat. 52; 43 U. S. C. secs. 324, 326, 333). The statute requires that to be subject to desert entry land must be susceptible of irrigation by practicable means, and further that it be surveyed, unreserved, unappropriated, nontimbered and nonmineral, except that lands withdrawn for certain specified minerals may be entered with reservation thereof. Whether a particular tract meets these conditions will be examined before the application is allowed and the question of irrigability will be investigated in the field. 43 CFR 232.1, 232.3.

In relation to these requirements the reports here show that the lands sought by Bartine are nontimbered and nonmineral. Further, the records of the Survey Division of the General Land Office show that in 1930, when Bartine is alleged to have initiated this claim, the lands were unsurveyed and that they did not become surveyed lands until September 27, 1939. That date therefore was the earliest date on which application for desert-land entry might properly be filed. By that date, however, the two withdrawals had intervened. These would have to be considered as barring entry unless applicable law permits some valid right to unsurveyed desert lands to be initiated and unless such a right can be established in this case.

The 1908 act amending the desert-land act of 1877 bears on this point. Although prohibiting desert-land *entry* of unsurveyed lands, it gives a preference right of entry to a qualified person who performs certain acts on unsurveyed lands before their survey. Its proviso states:

\* \* \* That any individual qualified to make entry of desert lands under said Acts who has, prior to survey, taken possession of a tract of unsurveyed desert land not exceeding in area three hundred and twenty acres in compact form, and has reclaimed or has in good faith commenced the work of reclaiming the same, shall have the preference right to make entry of such tract under said Acts, in conformity with the public land surveys, within ninety days after the filing of the approved plat of survey in the district land office.

In 1911, when considering this preference right in the case of *Virgil Patterson*, 40 L. D. 264, the Department found the basis of the right in the performance of those acts which alone are required by the desert-land law for the acquisition of title, namely, taking possession of the land and reclaiming or beginning to reclaim it. Residence on

the land not being required as under the homestead laws, the resulting interest is not one of homestead settlement, and a person claiming desert lands by virtue of possession and reclamation alone, without residence, is not a "settler" in the customary sense of that term.<sup>4</sup> The desert-land interest of a claimant not residing on the land is, however, substantial, an interest, the decision said, "of which \* \* \* he cannot be deprived except by his own default in complying with law or by a valid withdrawal of said lands for government uses," and a claimant's preference right of entry attaches to the land immediately upon the filing of the approved plat of survey.

The Secretary's regulations clearly regard a claimant's interest and right hereunder as originating before the filing of the plat of survey, namely, at the time of the commencement of the basic acts. Paragraph 7 of General Land Office Circular No. 474 of May 18, 1916 (45 L. D. 345; 43 CFR 232.9), says:

*To preserve this preference right the work of reclamation must be continued up to the filing of the plat of survey, unless the reclamation of the land is completed before that time, and in that event the claimant must continue to cultivate and occupy the land until the survey is completed and the plat filed. A mere perfunctory occupation of the land, such as staking off the claim or posting notices thereof on the land claimed, will not secure the preference right as against an adverse claimant. While actual settlement and residence upon the land, as required under the homestead law, are not necessary, the possession and improvements must be such as to conform to the requirements of the desert-land law and must evidence good faith on the part of the claimant. [Italics supplied.]*

In *Heirs of Etta J. Kisner*, 46 L. D. 318, the Department further examined this right. There it held that in principle there is no difference between the preference right of entry based on acts of possession and reclamation on unsurveyed lands under the desert-land act of March 28, 1908, and the preference right of entry accorded by the settlers' relief act of May 14, 1880 (21 Stat. 140; 43 U. S. C. secs. 166, 223), to settlers, namely, those who have performed acts of settlement—*residence*, cultivation and improvement—on public lands, whether surveyed or unsurveyed. Neither right is lost, the Department said, if its possessor dies before survey of the lands. It inures to the heir or to the devisee.

Commenting in *William Boyle*, 38 L. D. 603, 610, on the preference-right provision of the settlers' relief act of May 14, 1880, the Department considered that by according a preference right of entry to settlers this statute *invited* settlement. It said of Boyle, who had

<sup>4</sup> See Charles Perrine, 3 L. D. 331, and Revised Statutes, secs. 2401, 2402, 2403; 43 U. S. C. secs. 759, 760, 762. See, also, act of May 14, 1880 (21 Stat. 140; 43 U. S. C. secs. 166, 223).

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settled on unsurveyed lands before their inclusion in a reclamation-act withdrawal, "his settlement under a law *inviting it to be made on unsurveyed land* gave him right to acquire the title subject only to its being taken by the government for its own use." In the *Patterson* case, *supra*, the Department quoted this passage from what it termed an "analogous" case. It therefore seems clear enough that, no less than the act of 1880, the act of March 28, 1908, in according the desert-land preference right above described, *invites* the occupancy and reclamation of unsurveyed lands and that acceptance of the invitation initiates an interest in the lands.

More recently, the doctrine of these rulings has been applied where unsurveyed lands in process of being reclaimed were included in a withdrawal (Executive Order No. 6587, February 6, 1934) in aid of legislation, conservation, and grazing uses, ordered under the authority of the act of June 25, 1910 (36 Stat. 847; 43 U. S. C. secs. 141-143).<sup>5</sup> In considering the question raised in this *Bennion* case, the Department recognized that under the third proviso of the 1910 act<sup>6</sup> the lands authorized to be excepted from the force of withdrawals made thereunder were to be lands within homestead and desert *entries* and lands on which valid *settlement* had been made and on which *settlers* had continued to comply with the law, but it held that the proviso gives as full protection to the holder of a preference right under the desert-land act of 1908 as it accords to the homestead settler.

The Department also held it unnecessary to revoke the withdrawal as to the lands affected by the preference right, in effect stating that the withdrawal had been inoperative as to lands embraced in any *continuing bona fide* claims and that such claims were to be perfected under the laws under which they were initiated.

Further to be noted concerning prior rights in relation to withdrawals are the facts (1) that it is the exceptional withdrawal order which does not protect existing valid rights, and (2) that the grazing-district withdrawals authorized by the Taylor Grazing Act are *required* to protect such rights, section 1 of the act containing the following provision:

\* \* \* *Nothing in this Act shall be construed in any way to diminish, restrict, or impair any right which has been heretofore or may be hereafter initiated*

<sup>5</sup>First Assistant Secretary to Mrs. Glynn Bennion, May 2, 1934, Secretary's file No. 2-141 (part 17), General Land Office—Desert-Land Entries—General.

<sup>6</sup>\* \* \* *And provided further, That there shall be excepted from the force and effect of any withdrawal made under the provisions of this Act all lands which are, on the date of such withdrawal, embraced in any lawful homestead or desert-land entry theretofore made, or upon which any valid settlement has been made and is at said date being maintained and perfected pursuant to law; but the terms of this proviso shall not continue to apply to any particular tract of land unless the entryman or settler shall continue to comply with the law under which the entry or settlement was made: \* \* \**

*under existing law validly affecting the public lands, and which is maintained pursuant to such law except as otherwise expressly provided in this Act \* \* \*.*  
[Italics supplied.]

In summary, then, it appears that one who takes possession of unreserved, unsurveyed desert land, who begins to reclaim it, and who is continuing his reclamation operations at the date of an inclusion of the land within a withdrawal like the general withdrawal of November 26, 1934, ordered under the act of 1910, or within a grazing-district withdrawal, has initiated a valid claim upon which the withdrawal does not operate. The claim may be asserted by the filing of a proper desert-land application as soon as the lands become surveyed, namely, as soon as the approved plat of survey is filed in the local land office, if at that time the claimant shall still be in possession of the lands and shall be complying with the regulations. Moreover, as soon as the application is found regular, it may be allowed without reference to the withdrawal, since that is held never to have operated upon the lands claimed.

A different question is that raised by the statutory limitation of the life of the preference right to 90 days from the filing of the plat of survey. Does this mean that failure to apply within the 90-day period automatically extinguishes the right? Further, upon expiration of the period without application by an adverse party does the withdrawal attach as an adverse claim?

Discussing the settlers' relief act of 1880 in *Wilson v. State of New Mexico*, 45 L. D. 582, the Department held that the provision in section 3 of the settlers' relief act of May 14, 1880, limiting to 3 months from the date of the filing of the township plat the time within which a settler on unsurveyed lands must assert his claim, was intended solely for the protection of the rights of settlers *as among themselves*. In *Moore v. Northern Pacific Ry. Co. et al.*, 43 L. D. 173, a settler's right was attacked by a claimant who had done nothing on the land but was making a scrip application under a soldier's additional homestead right. Applying an early Supreme Court rule, the Department held that a settler on unsurveyed lands who fails to make timely entry forfeits his right in favor of a subsequent *settler* who asserts his claim in time; but that *in the absence of an adverse settlement*, the settler loses no rights by his failure to assert his claim within the prescribed period.

The Department pointed out that the grant of this preference right by the 1880 act was an extension to homestead settlements of the provisions of section 5 of the preemption act of March 3, 1843 (5 Stat. 619). It stated that the Supreme Court in *Johnson v. Towsley*, 13 Wall. (80 U. S.) 72 (1871), had long ago defined the right as a preference right over subsequent *settlers*, a right which is waived by the first settler in favor of a later settler if in presenting their



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respective claims the first settler is negligent but the later settler is in time; and it quoted the Court as declaring—

\* \* \* If no other party has made a settlement or has given notice of such intention, then no one has been injured by the delay beyond three months, and if at any time after the three months, while the party is still in possession, he makes his *declaration*, and this is done before any one else has initiated a right of preemption by settlement or declaration, we can see no purpose in forbidding him to make his declaration or in making it void when made. And we think that Congress intended to provide for the protection of the first settler by giving him three months to make his declaration, and for all other settlers by saying if this is not done within three months any one else who has settled on it within that time, or at any time before the first settler makes his declaration, shall have the better right. [Italics supplied.]

The Department further said:

While a settler may lose his preference, over other settlers, by failure to comply with the requirements of the act of May 14, 1880, *supra*, his right to the land, acquired by settlement thereon, was not created by that act but has been recognized by this Department and the courts from the beginning of the Government. Our whole public-land system is based upon the fundamental consideration that the *settler* is to be preferred over *claimants who seek to assert scrip or other rights* to the public domain. Lands settled upon and claimed under the homestead law do not fall within the designation of public lands open to sale or other disposition under general laws other than those relating to settlement. This Department is not robbed of its jurisdiction and duty to give equitable consideration to asserted settlement claims by the tender of a scrip application for the land by one having no claim to equitable consideration. [Italics supplied.]

In emphasis of this position the Department referred to *State of South Dakota v. Thomas*, 35 L. D. 171 (1906), where the State, claiming a school grant, was protesting Thomas' settlement on unsurveyed lands. There the Department said that it had never applied the forfeiting provision of the 1880 act in favor of a grantee claimant and that—

\* \* \* any question governing the formality of the assertion and completion of title under such settlement is clearly a matter between the United States and the settler.

Concededly, as above shown, the desert-land claimant does not fall within the descriptive term "settler" as used in the statute and cases just discussed. Nevertheless, it has been found that the desert-land claimant has a heritable interest; that like the settler he performs on the lands all the acts required for acquisition of title thereto; that he has the invitation of a statute to perform them; that he has a preference right indistinguishable in principle from that of the settler; and that he is as fully protected as the settler in the matter of withdrawals under the act of June 25, 1910, *supra*.

It seems reasonable, therefore, to extend to the statutory 90-day limitation of the desert-land preference right an interpretation similar to that given to the settler's preference right. Such interpretation would conclude that the 90-day limitation in the 1908 act is intended for the protection of the rights of desert-land claimants and homestead settlers as among themselves, and that in the absence of asserted adverse claims of desert-land reclamation or of homestead settlement a desert-land claimant, who upon the filing of the plat of survey fails to make timely assertion of his right of entry, forfeits no rights and does not lose his lands because of a withdrawal not previously operative upon them. In the absence of other claimants, delay harms no one, and the matter is one between the claimant and the Government alone.

It is in the light of the rules just reviewed that the Commissioner's decision and the facts in this case must be considered. In the first place, it is to be noted that any right acquired by Bartine before survey has continued to date and is unimpaired despite Bartine's delay in asserting it. The unsurveyed lands claimed by him became surveyed lands on September 27, 1939, when the approved plat of survey was filed in the Carson City land office. Accordingly, Bartine's preference period expired on December 26, 1939; and it is true that not until 4 years later, September 27, 1943, did Bartine make application for desert entry and assert his claim. However, no adverse claim has at *any* time been filed for this land and, under the law as above interpreted, Bartine's delay has caused no loss or impairment of such right as he may have had when the plat was filed on September 27, 1939.

In the second place, it is clear that unless some exception to the rule requires otherwise, Bartine can establish a right existing in himself as of September 27, 1939, only by showing—

1. That he took possession of the tracts claimed and began the reclamation of them before the withdrawal of November 26, 1934;
2. That he continued his work of reclamation not only until the withdrawal of November 26, 1934, but also until the grazing-district withdrawal of November 30, 1937, and, still further, until the filing of the plat of survey on September 27, 1939; or, if he completed the reclamation before any of these dates, that he continued to occupy and cultivate the land until the filing of the plat (43 CFR 232.9).

As to point 1 and the date when he went upon the lands, Bartine has said only that he "has held possession of all of the lands hereinabove described for a period of about 12 years." This statement is too general to be accepted by itself and has not been substantiated, not having been investigated by the Commissioner of the General Land

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Office. As to when he began the reclamation, Bartine makes no statement at all, merely alleging that during the 12-year period he has developed water and cultivated the lands. It is, therefore, entirely possible that while Bartine may have taken possession of the land in 1931, as his petition indicates, or even in 1930, as his attorney states, he may not have begun his reclamation work before the first withdrawal. In that event, he could not establish such prior right as alone could except the lands from the withdrawals and entitle him to entry without regard for the withdrawals.

Despite the inadequacy of the instant file on these points, the Department is able to supply some of the defects through the records of the Survey Division of the General Land Office. These show the following facts: On May 14, 1933, a United States cadastral engineer found Fred Bartine residing on certain unsurveyed lands. He examined this occupancy and made a "Bona Fides Report" thereon to the Commissioner of the General Land Office.<sup>7</sup>

The engineer stated that, with the apparent intention of creating a home for himself, Bartine, a married man, was residing on tracts which were approximately secs. 9, 16, and 17 of the unsurveyed T. 19 N., R. 50 E., M. D. M., Nevada, land which was desert land and could be reclaimed.<sup>8</sup> Personal property on the premises consisted of a cook stove, tables, chairs, benches, cupboards, beds, 2 plows, 1 harrow, 1 scraper, 425 feet of unused 6-inch iron pipe, a 1½-ton Chevrolet truck, a 1½-ton International truck, and a 1929 Hudson sedan.

Improvements consisted of a flowing artesian well, 480 feet deep, 6-inch iron casing; 2½ miles of 4-inch pipe line leading to the land to be filed on; 160 rods of 4-strand barbed wire fence; ditches; excavated reservoir; four-room house, 24' by 24', built of concrete, with finished boards and finished flooring; 12 acres cleared, 8 acres cultivated, 45 shade trees, of a value of \$5,200. Growing crops consisted of hay, grain, and garden truck. The reservoir, 64' by 24', with an average depth of 5 feet, was to be completed and concrete lined. Twenty acres were to be cleared, cultivated, and fenced in 1933.

<sup>7</sup> The report was made on form 4-514, which is designated as being "For the use of U. S. Surveyors of the General Land Office in examination of lands for the survey of which Settlers' Applications have been made."

<sup>8</sup> It is to be noted that although sec. 16 would normally have belonged to the State of Nevada as a school section by grant of the United States, the Nevada Legislature, by act of March 8, 1879, relinquished to the United States all the 16th and 36th sections that had been granted to it except those which the State had sold or disposed of, and in lieu of said school sections accepted a quantity grant of 2,000,000 acres to be selected by the State. By act of June 16, 1880 (21 Stat. 287), the United States made said quantity grant to Nevada and confirmed the title of such of the school lands as the State had previously disposed of. The 16th section here in question, not having been alienated by the State, therefore returned to the United States and was subject to the public-land laws in 1930 when Bartine occupied part of it. Accordingly, this section is not subject to Executive Order No. 7599 of April 1, 1937, and 43 CFR 297.18.

The engineer referred to an application by Bartine for survey and said that it was being made at the solicitation of the engineer in order that claimant might file on the land for homestead purposes. The engineer recommended survey of the township.

On May 30, 1933, Bartine made an affidavit on form 4-512,<sup>9</sup> in which he took oath that he was a bona fide settler on these lands; that he had resided on them since April 1931; that he wished to enter them under the homestead law; and that there were no other settlers residing upon the land desired to be surveyed. He also recited concerning his improvements most of the facts reported by the engineer.

On the basis of the engineer's bona fides report and of Bartine's application, special instructions, group 177, Nevada, for the survey of T. 19 N., R. 50 E., M. D. M., were drawn up under date of July 26, 1933, and were approved on August 11, 1933. However, because all available funds were required for Nevada surveys previously authorized, execution of this survey was not reached until 1936.<sup>10</sup> Begun on July 9, 1936, the survey on the ground was completed on August 11, 1936. But the plat was not accepted until June 30, 1937, and the approved plat was not filed in the local land office until September 27, 1939. Thereby, that date became the date of survey. The field notes of the survey appear in Nevada, vol. 177, p. 471.

From the engineer's bona fides report and Bartine's application for survey it is evident, therefore, that well before the withdrawal of November 26, 1934, Bartine had taken possession of considerable desert land in three sections of the unsurveyed T. 19 N., R. 50 E., and had begun some reclamation work thereon. But it is to be noted that neither the engineer nor Bartine mentioned as among the lands occupied in May 1933 any lands in sec. 15, in which three forties are now being sought. Nor does the survey of 1936 refer to any sec. 15 lands as making part of the claim in July and August of that year. The plat then made and later approved and filed depicts the Bartine claim by name and indicates the location of its boundaries, fences, buildings, wells, reservoirs, ditches, and pipe lines. It shows that by July 1936 a large reservoir covering about 70 acres in sec. 10, not here sought, had been added to the earlier improvements, but that otherwise the claim was limited to lands on the sections previously mentioned, namely, 9, 16, and 17.

Accordingly, in the absence of convincing evidence to the contrary, it would seem that Bartine's petition of September 27, 1943, for classification of lands in sec. 15, as well as in sec. 16, was mistaken

<sup>9</sup> Form 4-512 is known in the Land Office as "Application of settler for survey of land resided upon—agricultural lands."

<sup>10</sup> See correspondence, instructions, blueprints, etc., in group 177, Nevada, U. S. Survey records, in National Archives.

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in stating that he had had about 12 years' possession of *all* the lands sought. It seems clear not only that the three forties in sec. 15 here sought and now being cultivated, namely, NW $\frac{1}{4}$ NW $\frac{1}{4}$ , NE $\frac{1}{4}$ NW $\frac{1}{4}$ , and NW $\frac{1}{4}$ NE $\frac{1}{4}$ , were not claimed in the years before the withdrawal, but also that for at least 18 months after the withdrawal they continued unclaimed and unreclaimed even in part. Unless this can be disproved, it would have to follow that, having done nothing to the sec. 15 tracts before November 26, 1934, Bartine did not acquire in them any interest that could except them from the withdrawal of that date.

A second point to be noticed is that of all the lands shown to have been included in the claim in 1933 and 1936 the only tracts being sought in the current application are those in sec. 16. It follows that Bartine cannot under this application derive any benefit from the making of such of the improvements described as may have been located on lands not embraced in this application, namely, the tracts in secs. 17, 9, and 10.

As to which improvements are on lands within this application and which are not, it is to be noted that in their May 1933 papers neither the engineer nor Bartine stated on what subdivisions, approximately, the several improvements then mentioned had been placed. Further, in 1943 Bartine gives only incomplete information about this in his petition. He locates one of his artesian wells on NE $\frac{1}{4}$ SE $\frac{1}{4}$  of sec. 17, not here applied for, and the two others on SW $\frac{1}{4}$ NW $\frac{1}{4}$  of sec. 16, which is applied for. But he is indefinite about his several buildings. These he says are located "on or near the SW $\frac{1}{4}$ NW $\frac{1}{4}$  of Sec. 16."

Bartine's location of the wells is confirmed by the field notes of the 1936 survey. The general description has the following to say:

Three artesian wells have been drilled by the present occupant of the lands in sections 16 and 17; the largest of these is located in the northern portion of the NE $\frac{1}{4}$ SE $\frac{1}{4}$  of section 17 and flows about 600 gallons per minute. A second well is located in the extreme southwestern portion of the SW $\frac{1}{4}$ NW $\frac{1}{4}$  of section 16 and this well flows about 100 gallons per minute. The third well is located near the center of the SW $\frac{1}{4}$ NW $\frac{1}{4}$  on section 16 and flows about 200 gallons per minute. These wells were all brought in at 355 ft. depth; the water is clear and cold and used for domestic purposes and for irrigation of the adjacent fields, claimed and operated by Fred Bartine. Mr. Bartine is the only settler in the township and has fenced approximately 260 acres in the south-central part of section 9, N $\frac{1}{2}$  of section 16, and the east-central part of section 17. Improvements consist of a small dwelling house and seven farm buildings all in good condition and substantially erected. Alfalfa and wheat, in addition to a small vegetable garden, are the only crops.

Overflow or waste waters from the aforementioned wells and springs are allowed to run to a natural depression, forming a reservoir of about 70 acres area. This reservoir is situated in the SW $\frac{1}{4}$  of section 10; the high water

mark was traversed and its position has been shown on the topographical plat of the township.

But as to Bartine's buildings, the field notes indicate that Bartine's statement is accurate only in part. They show that his seven buildings, although near one another, are actually situate on four different forties. *Three of those forties are not here applied for.* Further, only one of the seven buildings is on land which is included in the application. That building is a frame garage, 17' by 41', and is on SW $\frac{1}{4}$ NW $\frac{1}{4}$  sec. 16. The six other buildings, together with some important improvements, are all located on lands not applied for and are as follows:

On sec. 16, NW $\frac{1}{4}$ SW $\frac{1}{4}$ :

1. Dwelling, 24' by 24' ;
2. Frame building, 7' by 10' ;
3. Frame building, 6' by 8' ;
- also a dirt reservoir, 100 feet square by 8 feet deep.

On sec. 17, NE $\frac{1}{4}$ SE $\frac{1}{4}$ :

4. Blacksmith shop, 30' by 40' ;
- also a 600-gallon artesian well (the largest of the three wells).

On sec. 17, SE $\frac{1}{4}$ NE $\frac{1}{4}$ :

5. Chicken house, 9' by 62' ;
6. Two-story frame barn, 17' by 25' ;
- also a part of the garden.

On sec. 10, S $\frac{1}{2}$ :

7. 70-acre reservoir, covering parts of five forties.

It is apparent, therefore, that by May 1933 Bartine through occupancy, improvements, and reclamation work had acquired a valid interest in certain tracts for which he is not applying, and on the other hand that he is applying for certain tracts in which he seems not to have earned any interest before the withdrawals. Obviously, if he wishes to acquire title to the tracts on which are located his most abundant well, his residence, barn, blacksmith shop, chicken house, and two smaller structures, tracts moreover in which he has acquired a valid interest, he must amend his application to include NE $\frac{1}{4}$ SE $\frac{1}{4}$  and SE $\frac{1}{4}$ NE $\frac{1}{4}$  in sec. 17 and NW $\frac{1}{4}$ SW $\frac{1}{4}$  in sec. 16.

In the event of such amendment, the statutory limitation of a desert-land entry to 320 acres would require that three of the forties now included in the application be dropped. Those sacrificed might well be forties in which no interest appears to have been acquired before the withdrawal of November 26, 1934. The three forties in sec. 15 seem to be such land, and there may have been others like them.

On this point, it is important to note the following facts concerning sec. 16 and the five forties sought in its N $\frac{1}{2}$ : The survey records of 1933 and 1936 when studied together seem to indicate some occupancy and reclamation work on two of these forties before November 26, 1934, for the pipe line and part of the garden spoken of by the 1933 papers are shown by the 1936 records to have been on the NW $\frac{1}{4}$ NW $\frac{1}{4}$  and the SW $\frac{1}{4}$ NW $\frac{1}{4}$ . But the records give no indication that the three other forties, NE $\frac{1}{4}$ NW $\frac{1}{4}$ , NW $\frac{1}{4}$ NE $\frac{1}{4}$ , and NE $\frac{1}{4}$ NE $\frac{1}{4}$ , were part of the claim before November 26, 1934. The

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1933 papers do not state the approximate location of any of the ditches, fields, fences, cultivation, and trees which they mention, and the 1936 papers do not give any dates for the initiation of work on the ditches, fields, and fences which they show on the three forties mentioned. Hence, there is nothing to indicate whether these forties became occupied before the withdrawal or only thereafter, between the withdrawal and the survey. Yet if occupation and reclamation of this land did not occur before November 26, 1934, the withdrawal attached to the land as a primary claim and foreclosed initiation of a right in the land.

In the light of the foregoing analysis, there is no question but that Bartine initiated a valid right to a portion of the lands here sought, a right that still exists. There is uncertainty, however, as to the extent of the right and the identity of the legal subdivisions to which it has attached. This question can be resolved only by careful investigation in the field and by the sifting of the available documentary evidence. That evidence would include Bartine's statements made in Carson City 020283, his application of May 24, 1937, for enlarged-homestead entry of 320 acres in secs. 16 and 17; and those in Carson City 020915, his application of July 3, 1940, for 640 acres in secs. 9, 15, 16, and 17, under the Pittman Act.

Accordingly, the Commissioner's decision is reversed and the case remanded with directions to the Commissioner to have full investigation of the claim made in the field with the aid of the files in the several applications just cited; to call upon the applicant for further precise showings as to when he took possession of the respective subdivisions, when he began the work of reclamation upon each of them and as to the character of the reclamation done; to have the field examiner advise with the applicant and make recommendations as to the specific amendments necessary for his entry of those tracts to which he has initiated a right and which contain the improvements and buildings most desired; and in the light of said report, showings, and recommendations, to adjudge the case in accordance with the views above expressed.

OSCAR L. CHAPMAN,  
*Assistant Secretary.*

## INVENTION OF IMPROVED HYDRAULIC COMPRESSOR

Order No. 1763—Duties of Employee—Act of March 3, 1883, as Amended—  
Certificate of Public Interest.

A Hydraulic Compressor invented in his spare time by an engineer employed by the Bonneville Power Administration, whose usual duties consisted of preparing specifications and bid forms for high-tension electric transmission lines, is not required to be assigned to the Government under Departmental Order No. 1763 of November 17, 1942.

A Hydraulic Compressor, the use of which may lower Government construction costs, may properly be certified as liable to be used in the public interest under the act of March 3, 1883, as amended (35 U. S. C. sec. 45).

M-34289

NOVEMBER 29, 1945.

THE SECRETARY OF THE INTERIOR.

MY DEAR MR. SECRETARY: My opinion has been requested concerning the relative rights of the Government and the inventor in an Improved Hydraulic Compressor invented by Marsh F. Beall, an engineer employed by the Bonneville Power Administration at Portland, Oregon.

Mr. Beall's engineering duties consist of preparing specifications and bid forms for the construction of high-tension electric transmission lines and the purchase of materials entering into such construction. While in the field, Mr. Beall observed the customary method of applying compression-type fittings, which employs two dies brought together by reciprocating motion, the necessary pressure being developed by three or four men working a long lever. In August 1944, he conceived the idea of developing a compressor using rotary motion, so designed as to effect a considerable reduction in the mechanical force required to be applied. Such a compressor could be operated either by electrical power or by one man using a hand wheel. Mr. Beall set his ideas on paper between September 1 and 29, 1944, at his home in Oswego, Oregon, preparing sketches and a description of his invention which he submitted to the Suggestions Committee of the Bonneville Power Administration.

In the circumstances, Departmental Order No. 1763 of November 17, 1942, does not require Mr. Beall to assign his invention to the Government. The invention did not arise in the course of assigned research, since Mr. Beall's usual duties consisted of preparing specifications and bid forms, and the purchases for which he prepared specifications and bids do not appear to have included compressors. In this respect the case differs from that discussed in opinion of July 14, 1944, 58 I. D. 726, and from the affirmation of that opinion dated September 19, 1944, 58 I. D. 738, where the inventor, whose usual duties were similar to those of Mr. Beall, developed a valve in response to a request of his supervisor to procure a valve of a certain type to answer a specific need. Nor has the invention been developed on Government time, using Government facilities or financing, or with the aid of information not available to the public. The inventor is, therefore, entitled to all rights in his invention, free of any claims by the Government.

Mr. Beall has, however, expressed his desire to have his patent application prosecuted under the act of March 3, 1883, as amended (35 U. S. C. sec. 45), in consideration for granting the Government rights



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to the manufacture and use of the invention, by and for the Government, for governmental purposes. Upon his showing that use of his Hydraulic Compressor may lower Government construction costs by saving time and labor, the signing of the certificate of public interest required for the filing of a patent application under the act appears to be justified.

WARNER W. GARDNER,  
*Solicitor.*

Approved:

MICHAEL W. STRAUS,  
*Assistant Secretary.*

**INVENTION OF NARROW BAND TRANSMISSION MADE BY EMPLOYEE OF THE INTERIOR DEPARTMENT ON MILITARY FURLOUGH**

**Order No. 1763—"Government"—Act of March 3, 1883, as Amended—Certifying Department.**

An invention made by an employee of the Interior Department while on military furlough, which did not arise in the course of assigned departmental research, was not made or developed with departmental facilities or financing, or on departmental time, or with information not available to the public obtained through the inventor's employment with the Department, is not required to be assigned to the Government under Departmental Order No. 1763 of November 17, 1942.

The Navy Department is the proper Department to certify as being of public interest under the act of March 3, 1883, as amended (35 U. S. C. sec. 45), an invention made by a member of the Navy.

M-34300

NOVEMBER 30, 1945.

THE SECRETARY OF THE INTERIOR.

MY DEAR MR. SECRETARY: A memorandum from the Bonneville Power Administrator dated October 8, addressed to you, requests my opinion as to the relative rights of the Government and the inventor in an invention made by Lyman R. Spaulding while on military furlough from the Bonneville Power Administration. Mr. Spaulding is still in the armed forces.

Whatever rights the Government may have in Mr. Spaulding's invention of a Narrow Band Transmission system, they do not arise by virtue of the provisions of Departmental Order No. 1763 of November 17, 1942. Assuming that Mr. Spaulding while on military furlough remains an employee of the Interior Department within the meaning of Order No. 1763, a question that need not be answered at this time, nevertheless the invention did not arise in the course of assigned re-

search in the Department, nor was it made or developed with departmental facilities or financing, or on the Department's time, or with information not available to the public obtained through Mr. Spaulding's employment with the Department. Although the order purports to require the assignment to the Government of inventions whenever made by research employees of the Department in the course of their assigned *Government* research, or made or developed on *Government* time, or with *Government* facilities or financing, or through the aid of *Government* information not available to the public, it is obvious that the word "Government" is intended to apply only to those phases of governmental activity within the jurisdiction or control of the Interior Department. Therefore, Mr. Spaulding is not obligated to assign his invention to the Government under the provisions of Order No. 1763. Whether the Government may have any rights in the invention by reason of Mr. Spaulding's status in the Navy is not for me, but for the Navy Department, to say.

Mr. Spaulding has expressed the desire to have his patent application prosecuted free of Patent Office fees under the act of March 3, 1883, as amended (35 U. S. C. sec. 45), if he is not required to assign his invention to the Government under Departmental Order No. 1763. As a member of the armed forces, Mr. Spaulding is eligible to receive the benefits of the act, except for such claim as the Navy may have to his invention, but he should request the necessary certificate of public interest from the Navy, rather than from the Interior Department. The act provides:

The Commissioner of Patents is authorized to grant \* \* \* to any officer, enlisted man, or employee of the Government \* \* \* a patent \* \* \* without the payment of any fee when the head of *the* department or independent bureau certifies such invention is used or liable to be used in the public interest: \* \* \*. [Italics supplied.]

The word "the," italicized above, contemplates certification by the Navy Department with respect to an invention made by a Navy man who then was and still is in the Navy.

However, there is no legal reason why you may not certify Mr. Spaulding's invention as being in the public interest if and when he resumes his civilian status in the Interior Department, if the Navy Department by that time has neither certified the invention to the Commissioner of Patents nor has asserted title thereto on behalf of the Government.

WARNER W. GARDNER,  
*Solicitor.*

Approved:

MICHAEL W. STRAUS,  
*Assistant Secretary.*

UNITED STATES *v.* C. E. STRAUSS ET AL.

A-23706

*Decided December 27, 1945***Placer Mining Claims—Valuable Mineral Deposits—Discovery.**

Whether deposits of gypsum, clay, limestone, and other mineral substances of wide occurrence, are valuable mineral deposits subject to location under the mining laws is a question of fact and depends upon the marketability of the deposits.

Showings of oil in shallow wells are insufficient to constitute a discovery where the possible oil-bearing formations lie at depth and are separated from the surface by non-oil-bearing strata.

A decision holding placer mining claims to be null and void because of lack of discovery of valuable minerals and lack of diligent prosecution of work leading to discovery will not be disturbed where no new evidence is submitted to show that a discovery was made or that there was diligent prosecution of work leading to a discovery.

**MOTION FOR THE EXERCISE OF SUPERVISORY AUTHORITY**

Anthony J. Denny, of Green River, Utah, has petitioned the Secretary to exercise his supervisory authority in the following circumstances: On February 18, 1941, the Government instituted adverse proceedings known as Salt Lake City contests Nos. 7687 and 7688 against a number of persons who in 1912 had filed notices of several hundred placer mining locations in Emery County, Utah. In contest No. 7687 the defendants were C. E. Strauss and others and their heirs; in contest No. 7688, H. M. Curry and others, their heirs, and the Duquesne Assessment Association. The Government also made party to both contests the present petitioner, Anthony J. Denny.

Denny was not one of the original locators, but since April 7, 1930, has been occupying and claiming these locations under an alleged agreement with Grant Curry, onetime secretary of the Duquesne Assessment Association, of which the only evidence is an unsworn, unnotarized statement, reading as follows:

APRIL 7, 1930.

Mr. A. J. Denny of Green River, Emery County, Utah, is now the owner of the interest of the Duquesne Assessment Association in certain lands south of Township 24 South, in Ranges Nos. 11, 12, 13, and 14 East, Emery County, Utah.

THE DUQUESNE ASSESSMENT ASSOCIATION,  
By GRANT CURRY, *Secretary*.

Of all the parties defendant in the contests, Denny alone answered the Government's charges and requested a hearing. Because of the failure of the other parties in interest to take any action, the Government closed the cases as to them and continued its proceedings against Denny alone.

On April 26, 1943, after extended hearings, the Commissioner of the General Land Office sustained a number of the charges and held null and void about 579 placer claims, blanketing large areas in Tps. 25 and 26 S., Rs. 10 to 14 E., inclusive, S. L. M. Of these 579 claims, 539 are here claimed by Denny. On December 29, 1943, the Department affirmed the Commissioner's decision, and on March 22, 1944, it denied a motion for rehearing. Denny now moves for the Secretary's reconsideration of the case through the exercise of his supervisory authority.

The claims here involved form a solid block of land covering some 86,240 acres. They are included within Utah Grazing District No. 7 and are now being used by Denny for the grazing of his stock. From the record it appears that Denny, taking the position that the lands are not part of the public domain, has erected signs at various points on the boundaries reading, "Private Property, No Trespassing" and has declined to remove them. He has also refused to pay grazing fees or to comply otherwise with the regulations of the Grazing Service.

The claims lie along the southern boundary of Emery County, Utah, in country known both as the San Rafael Desert and as the Green River Desert, between the Green and Colorado Rivers on the east and the huge dome known as the San Rafael Swell on the west. Underlying these claims is the geologic structure called the Nequoa Anticline and also the Nequoa Arch. During the past 25 years the stratigraphy and oil possibilities of this Arch, of the San Rafael Swell, and of the whole Green River Desert, together with other parts of the vast Colorado Plateau, have been the subject of numerous investigations and reports by the United States Geological Survey and by privately employed geologists. On the basis of these studies, much money has been spent on oil prospecting in the area, and test wells have been driven at various points on the Arch in the Green River Desert.

Among such wells were the Des Moines Oil Company well and the Mt. Vernon well, drilled in 1912-1913 in T. 26 S., R. 13 E., and T. 27 S., R. 12 E., respectively, and on the strength of the showings in these wells, according to petitioner's papers, Col. Charles P. Tasker, intimately connected with the companies drilling those wells, was able to interest W. L. Curry and his Pittsburgh associates, defendants here, in prospecting for oil the area here claimed. According to Land Office case files and published reports by the Geological Survey, the test wells mentioned proved unsuccessful and were abandoned.<sup>1</sup>

<sup>1</sup> Although the Des Moines well found some oil at 3,000 feet, petitioner has called its drilling results "discouraging." See Salt Lake City 033058 for an application made on September 26, 1933, by Anthony J. Denny for permission to pump and consume water from one of three wells drilled in 1912 by the Des Moines Oil Company on T. 26 S., R. 13 E., sec. 19. Denny stated that the water would be used to water 250 head of stock in time of drought and showed that for this use he had the consent of T. C. Conley, agent for Leon and Harry Meskimen, holders of an oil prospecting permit, Salt Lake City 033058,

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The locators in the instant case appear to have had no greater success, and after 13 unrewarding years they too gave up their search.

The record shows that the 539 claims in this case were all located in February 1912 by or on behalf of the contest parties other than Denny. In all cases, the location notices gave the same date for discovery as for location and stated that the claims were located for certain designated minerals "and other valuable mineral deposits." The materials specified in most of the notices were building stone, limestone, sandstone, or gypsum. In 28 notices, other materials were formally designated as follows: In 12 of the notices, aluminum; in one, clay; in two, manganese; in one, oil shale; and in 12, oil sand.

Although oil was specified in only 13 notices, Denny's answer to the several Government charges dealt only with oil, not once referring to any of the other minerals, but in express terms stating:

\* \* \* Evidence of the existence of oil on these claims was the leading factor in the location of these claims, which were made prior to the withdrawal of March 4, 1912.\*

Also, it was testified at the hearings that the locators' purpose as to all the claims was to prospect only for oil. This purpose was also evidenced by the fact that in the years 1913-1917 the so-called assessment work done was *group* assessment work<sup>3</sup> (on each five locations of 800 acres), under the act of February 12, 1903 (32 Stat. 825; 30 U. S. C. sec. 102), which under certain conditions allowed assessment work to be done on any one of a group of contiguous "oil-land locations not exceeding five."

The record further shows that from 1913 to 1926, inclusive, the Curry interests spent considerable sums on these claims, making their disbursements through the Duquesne Assessment Association, an organization of the locators set up especially to carry on the exploratory and development work. According to the proofs of labor placed on

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covering the site of these wells. In speaking of the Des Moines Oil Company's test oil well and of its having been drilled to a depth of 2,910 feet, Denny said, "*the drilling results being discouraging the well was properly plugged and the equity rights relinquished unto the Federal Government.*" [Italics supplied.]

According to a report of January 11, 1935, from the Geological Survey to the Commissioner of the General Land Office concerning Denny's application and the status of these wells, the 400-foot well had been obliterated; the 650-foot well had been abandoned, and the 2,910-foot well had been rigged up to be pumped as a water well and apparently had been used at intervals; further, the land embracing it had been withdrawn to preserve the well for public use, and all land within  $\frac{1}{4}$  mile of the well had been included in Public Water Reserve No. 107 by Order of Interpretation No. 196, approved February 3, 1934.

On March 10, 1935, the Commissioner denied Denny's application.

<sup>2</sup> The evidence referred to seems to have been that found by the Geologist Rice in 1911 in the course of an exploratory trip not on these claims, which had not yet been located, but on the San Rafael Swell and on a part of the desert in the neighborhood of these claims (exhibit 2).

<sup>3</sup> In *Union Oil Co. v. Smith*, 249 U. S. 337 (1919), group assessment work was held inapplicable to inchoate locations.

record by the Association, the total spent was not less than \$153,300, and whatever work was done on any of the claims in the area was done for oil. The first hole was drilled in 1913, the last in 1918, the total number of wells sunk having been about 100 or 125. All were comparatively shallow. The deepest was 600 feet. Most of them were only from 50 to 300 feet deep. From 1919 to 1926 only road and rock work was done. On March 22, 1925, W. L. Curry died, and after 1926 no more expenditures were made and no more work of any description was done on the claims either by the Association or by any locators individually.

On April 7, 1930, Mr. Grant Curry, secretary of the Duquesne Association, gave Denny the unacknowledged paper set forth above, stating Denny's ownership of the Association's interests. On July 1, 1931, Denny filed in Emery County notice of having done, in 1930-1931, \$100 worth of "road work, rock work, work on assessment holes and building dams to the amount of \$100 for each claim"; and at the hearings he testified that he had filed this notice solely to have the county records show that he was "the owner of the claims," the unacknowledged Grant Curry statement not being acceptable to the county for recording. He admitted that, despite his statement of work to the amount of \$100 for each claim, he had not expended the \$53,900 which the 539 claims would have entailed, and he was unwilling to say that he had spent even as much as \$2,000 on the work. He also testified that after 1931 he had done no more work on the claims, it being his opinion that the Association had before 1920 done enough work to earn patents to all the claims, having spent more than \$500 on each location, and that any further work was superfluous.

To the charge that there had been no discovery of oil, gas, or other leasable minerals before February 25, 1920, Denny's answer alleged that "numerous shallow wells were drilled prior to February 25, 1920, wherein saturated oil sands and pockets of oil were discovered, and, when bailing, oil appeared on the water in globules; these were valid claims existent at the date of the passage of the leasing act of February 25, 1920." But at the hearings Denny admitted that this was information given him by men who had worked on the claims and that he himself had no personal knowledge of these facts, not having come into this area until 1921. He insisted, however, that while not to his knowledge had there been any discovery of oil at the time of location, there had been discovery of "minerals."

Upon all the evidence adduced at the hearings, the Commissioner's decision of April 26, 1943, sustained the charges of no discovery and lack of diligent prosecution of work leading thereto. In the first place, it held, in effect, that the claims of discovery in the location

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notices were mere self-serving declarations on the part of the locators, not evidence of discovery, and that no mineral had been found within the limits of any of the claims in sufficient quantities to constitute a valid discovery at any time before the withdrawal of the land for Petroleum Reserve No. 25, on March 4, 1912, or before the approval of the Mineral Leasing Act of February 25, 1920 (41 Stat. 437; 30 U. S. C. sec. 181 *et seq.*), or at any time since said dates.

In the second place, the decision held, in effect, that neither at the date of the withdrawal on March 4, 1912, nor at the approval of the Mineral Leasing Act on February 25, 1920, were the claimants in diligent prosecution of work leading to the discovery of oil or gas, or any other minerals; that although some tests for oil were made through the Duquesne Assessment Association soon after the locations were filed, no appreciable amount of oil, if any at all, was discovered, and that no work done was continued to discovery.

These rulings were sustained by the Department both on appeal and on motion for rehearing but are now again disputed by petitioner in his instant proceeding. With a letter of July 5, 1944, to the Secretary, Denny transmitted a paper which purports to be a petition for the Secretary's exercise of his supervisory authority and for his review of the points in the Commissioner's decision just described. This petition, wholly informal, consists of seven pages of excerpts from scientific reports, Senate Committee Hearings, and letters, strung together with comments by petitioner. In further support of such argument as these suggest, petitioner appends several letters, affidavits, and reports by private geologists. Many of the papers are unauthenticated. All are replete with typographical errors. Here and there they omit key words or phrases. Otherwise, too, some are signally incomplete and lose force, being unaccompanied by the numerous plates and sketches to which they refer and which as integral exhibits are essential to an understanding of the texts.

Read together, the excerpts in the petition and the additional separate papers constitute, in effect, 14 exhibits. Of these, Nos. 1-6, 9, 12, and 13 are individual papers, and Nos. 7, 8, 10, 11, and 14 are quotations found on different pages of the petition. These 14 exhibits may be described as follows:

1. A small drawing in pencil purporting to be a map of the Green River Desert and the approximate location of the placer claims on the geologic structure known as the Nequoa Arch between the San Rafael Swell on the west and the Colorado River on the east.

2. A paper, 3 pages, purporting to be a copy of a letter of September 4, 1916, of 2¼ pages, from John A. Rice, a consulting geologist, to the Duquesne Association, Pittsburgh, Pennsylvania, entitled "Report

on the Petroleum Probabilities of the Property of the Duquesne Association," namely, the Association's placer claims on the San Rafael or Green River Desert in Emery County.

3. A paper, 9 pages, dated January 9, 1917, and purporting to be a copy of a report entitled "Conclusions Regarding the Probable Existence of Commercial Quantities of Petroleum Within the Boundaries of the Property of Duquesne Assessment Association in the San Rafael Desert, Utah," by John A. Rice, Geologist for Duquesne Assessment Ass'n. This paper refers to numerous sketches which petitioner omits to present.

4. A paper, 13 pages, purporting to be a copy of a "Geological Report on Parts of the Green River Desert, Emery, Wayne, Garfield, Grand, and San Juan Counties, Utah," by H. W. C. Prommel and H. E. Crum, under date of November 1926. Petitioner does not submit the plates which illustrate this text.

5. A paper, 1 page, purporting to be a copy of an affidavit of November 9, 1926, by H. W. C. Prommel and H. E. Crum, deposing that they are Petroleum Geologists; that from May to November 1926 they made a geological survey of parts of the Green River Desert in Utah; and that they have presented their findings and recommendations regarding the area in a report entitled "Geological Report—Parts of the Green River Desert, Utah."

6. A paper, 2 pages, purporting to give excerpts from an undated letter from Charles P. Tasker to Duquesne Oil Association giving information on the Des Moines and Mt. Vernon wells in sec. 19, T. 26 S., R. 13 E., and sec. 4, T. 27 S., R. 12 E., respectively. (See pp. 14, 15, and 16 of what purports to be Prommel and Crum report.)

7. A paper, 1 page, purporting to set forth part of a letter of March 2, 1927, from Clair Coffin, Chief Geologist for the Standard Oil Company, to H. R. Breitschneider, discussing the distribution of oil-saturated sands in the Green River Desert and speculating as to which rock formations may be the source of their oil. (See p. 6, Denny petition.)

8. A half page of quotations purporting to be excerpts from a study entitled "Correlation of the Permian of Southern Utah, etc.," by A. A. Baker and John B. Reeside, Jr., in bulletin of the American Association of Petroleum Geologists, vol. 13, No. II. (See p. 5, Denny petition.)

9. A paper, 1 page, purporting to be a copy of an analysis, dated June 17, 1944, by a Dr. Peterson, chemist, of seven samples of water taken from five wells and two springs on specified tracts in the Denny claims and showing the presence of calcium, chlorine, magnesium, potassium, sodium, and sulphate. (Separate sheet, exhibit 9.)



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10. Three excerpts from "Geology and Oil and Gas Prospects of Part of the San Rafael Swell, Utah," by James Gilluly, in United States Geological Survey Bulletin 806-C, at pp. 69 and 128 (re gypsum; see pp. 2 and 5, Denny petition), February 14, 1929.

11. An excerpt from "Geology of the Monument Valley-Navajo Mountain Region, San Juan County, Utah," by A. A. Baker, in United States Geological Survey Bulletin No. 865, at p. 56 (re gypsum; see p. 2, Denny petition), 1936.

12. A paper, 1 page, purporting to be a copy of an affidavit of June 14, 1944, by John Folsom, deposing that beginning in October 1913 he worked for 3 years on the placer claims of the Duquesne Assessment Association, assisting in pit digging and well drilling, and that in the course of said work he uncovered thick beds of *gypsum* and saw large quantities of limestone and building stone.

13. A paper, 1 page, purporting to be a copy of a letter of July 1, 1944, from J. W. Peterson, manager of the American Gypsum Company, to petitioner Denny, concerning gypsum deposits which he had examined on Denny's claims and the possibility of utilizing them.

14. About 2 pages of quotations purporting to be excerpts from Hearings before a Subcommittee of the Senate Committee on Public Lands held in pursuance of S. Res. 241, on November 19 and 20, 1943, at Salt Lake City, Utah, and Glenwood Springs, Colorado, pp. 1957-1958; 3534-3535. (See pp. 1, 3, and 4, Denny petition.)

In his letter transmitting his petition and these exhibits to the Secretary, Denny states that he is submitting "new facts and information on discovery, in addition to the evidence of discovery brought out at the hearings." However, except for exhibits 12 and 13, namely, the affidavit of Folsom and the letter from Peterson, both dated in 1944, and both relating to gypsum, none of the material now presented by Denny is "new." It was all in existence in 1942 at the time of the hearings and by the exercise of reasonable diligence could have been offered then. Further, it could have been incorporated into the record even had there been Government objection, for under Rule of Practice No. 38 (43 Code of Federal Regulations 221.38) the register, who conducts these hearings, may not rule on objections to the admission of evidence but may only note them.

Denny complains that at the hearing he "was not permitted to present any geological facts relating to the area in general to establish valid discovery" (petition, p. 4). But this assertion is not borne out by the record. The contest transcript shows that under the rule just cited two unauthenticated reports by John A. Rice on the geology of the area, here appearing as exhibits 2 and 3, *supra*, were offered at the hearing and placed in the record, despite the Government's objec-

tion that they were inadmissible. Had petitioner then offered the other geological papers which he now submits, they too could have been filed over objection and their admissibility considered.

Denny's petition makes no formal argument but merely presents quotations and interspersed comments from which his line of reasoning must be constructed. First, by quoting some informal remarks about a rule of mining law made before the Senate Public Lands Subcommittee in Salt Lake City on November 19, 1943 (exhibit No. 14, pp. 3534-3535, *supra*, petition, p. 1), Denny renews his efforts to disprove the Government's charge that minerals have not been found within the limits of the claims in sufficient quantities to constitute a valid discovery. In effect, he contends that at the time of location in February 1912 there was discovery of gypsum, stone of various kinds, clay, aluminum, manganese, or oil "and other valuable mineral deposits," as the location notices respectively recited; that it was sufficient discovery; and that it validated the claims, giving the locators the right to mine not only the minerals designated but also magnesium, oil, potash, or any other placer deposit that might subsequently be found within the limits of the respective locations (exhibit 14, petition, p. 1).

It will not be disputed that the right described does arise when a valid discovery of a placer deposit is made. Lindley on Mines (3d ed.) sec. 438. But it is to be recalled that recitals of discovery in recorded notices of location have no probative force; that they are mere *ex parte*, self-serving declarations on the part of locators, not evidence of discovery. In consequence, when controverted, discovery must be established independently of any recital in a recorded notice of location. Lindley on Mines (3d ed.) sec. 392; *Cole v. Ralph*, 252 U. S. 286, 303 (1920), and cases cited.

In this case, the Government challenged the recitals of discovery and at the hearing made a *prima facie* case that no valuable deposit of minerals was exposed on any of the claims. It was thereupon incumbent upon Denny to establish as a fact that valid discovery had been made. This he failed to do at the hearing, in the opinion of the Commissioner. As will appear, the additional papers which he offers with this petition do not make him any more successful now in the Department.

Here, petitioner alleges that he has made discovery on these claims of numerous minerals not mentioned in the location notices, namely, calcium, chlorine, magnesium, potassium, sodium, and sulphate. As evidence, he presents exhibit No. 9, *supra*. This informal, unsigned paper purports to give the chemical analysis of seven samples of water taken respectively from five of the wells and two of the springs

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on these claims and to show the percentage of each of the above-named minerals present in each sample. It is scarcely necessary to say that this species of evidence, even if properly presented, has no tendency to prove the presence at depth of valuable ore bodies containing the minerals named, nor does it offer to a reasonably prudent person any inducement or justification for the expenditure of time and money in a search for such deposits within the claims from which the waters were taken. It is obvious, therefore, that there has been no discovery of these minerals and that the allegation fails to validate any location.

Petitioner then reasserts that gypsum, lime, and building stone have been found on the locations in sufficient quantities to constitute valid discovery, and in fresh support of this claim he offers exhibits Nos. 10, 11, 12, and 13, described above.

As to the presence of gypsum and stone on these claims, in exhibits Nos. 12 and 13 the statements by Folsom and Peterson, respectively, relate to these particular claims and confirm the hearing testimony that gypsum and stone do exist on them. But the excerpts from the papers of the Geologists Gilluly and Baker, exhibits Nos. 10 and 11, have nothing to do with these claims. The Gilluly paper deals with the San Rafael Swell, to the west of the Denny claims, and speaks of large gypsum beds there. Baker's paper studies the Monument Valley-Navajo Mountain Region, a narrow belt of country lying 70 or 80 miles to the south of the Denny claims, in southern San Juan County; and mentions "marine limestone and abundant gypsum" as being present in the Carmel formation there. Since the locus of the gypsum is in each case so removed from the Denny claims, the evidence that gypsum occurs abundantly in the two areas studied can here be regarded only as indicating its probable wide distribution throughout this whole region. Its force is, therefore, only cumulative.

As to the validity of the gypsum and stone locations claimed by Denny, there are several points of law to be noted. Under the mineral laws of the United States (Rev. Stat. secs. 2318 and 2319; 30 U. S. C. secs. 21 and 22), only "*valuable* mineral deposits" may be located and the lands involved must be *valuable* for minerals. Further, all the authorities agree that a *valuable* mineral deposit exists only if its extraction is profitable and will justify expenditures to that end. *Cameron v. United States*, 252 U. S. 450, 459 (1920); *United States v. Southern Pacific Co.*, 251 U. S. 1, 13, 14 (1919); *United States v. Plowman*, 216 U. S. 372, 374 (1910); *Chrisman v. Miller*, 197 U. S. 313, 322 (1905); *United States v. Iron Silver Mining Co.*, 128 U. S. 673, 684 (1888); *Standard Oil Co. of California v. United States*, 107 F. (2d) 402, 415 (C. C. A. 9th, 1940), *cert. denied*

309 U. S. 654 (1940); 1 Lindley on Mines (3d ed., 1914) sec. 98, pp. 174-175.

Gypsum, clay, limestone, and the other kinds of stone here involved have been held to be minerals. *W. H. Hooper*, 1 L. D. 560 (1881); *Alldritt v. Northern Pac. R. R. Co.*, 25 L. D. 349 (1897); *United States v. Barngrover et al.*, 57 I. D. 533 (1942). But whether particular deposits of these and other mineral substances of wide occurrence are *valuable* mineral deposits within the contemplation of the mining laws and whether the lands containing them are therefore subject to location and purchase under the mining laws are questions of fact, *held to depend upon the marketability of the deposit*. The rule long laid down by both the courts and the Department requires that to justify his possession the mineral locator or applicant must show that by reason of accessibility, *bona fides* in development, proximity to market, existence of present demand, and other factors, the deposit is of such value that it can be mined, removed, and disposed of at a profit. *Ickes v. Underwood et al.*, 78 App. D. C. 396, 141 F. (2d) 546 (1944); *opinion of Acting Solicitor*, 54 I. D. 294 (1933); *Layman v. Ellis*, 52 L. D. 714 (1929). In *Big Pine Mining Corp.*, 53 I. D. 410, 412 (1931), the syllabus said:

Lands containing limestone or other minerals, which under the conditions shown in the particular case cannot probably be successfully mined and marketed, are not valuable because of their mineral content, nor subject to location under the mining law.

As concerns the facts in this case, it is to be recalled that testimony concerning these "locations" was given at the Salt Lake City hearing on January 29, 1942, by a witness for petitioner who had an intimate acquaintance with this region in general and with these claims and the operations on them in particular. This witness was H. C. Tasker, proprietor of the Green River hotel and son of the Charles P. Tasker who had first interested William L. Curry and his brothers, all of Pittsburgh, in the oil possibilities of Emery County, Utah, and who later had promoted the Duquesne Assessment Association. According to the records, H. C. Tasker had worked with his father on the Des Moines well, mentioned above as having been drilled to a depth of 3,000 feet only to be abandoned; and he had also been in the employ of the locators of the Denny claims as a sort of general foreman at the time of the making of these locations and for 2 years thereafter.

Tasker testified that these gypsum and stone locations were actually made because of the oil and gas which were supposed to be present in them at depth; that he had assisted in the surveying of these claims, and in 1913 and 1914 in the drilling of the test wells, exploring for oil. One test hole for oil, he said, uncovered a vein of desirable gypsum but the locators were advised against trying to mine it, their

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engineer representing that there was insufficient water for the necessary development operations.<sup>4</sup>

Tasker further testified that the railroad station nearest to the Denny claims was in the town of Green River, about 35 miles away by a road that was not very good. As to whether a prudent man would be justified in developing these deposits, Tasker considered that that would depend on the market, and said that he had *no knowledge* whether these minerals could be handled at a profit at that time (the time of the hearing) or might have been profitably handled at an earlier date.

Arthur E. Gibson, another witness for petitioner, also knew of the gypsum and stone on these claims but *he likewise was uninformed as to their marketability*, not knowing whether there would be sufficient demand for them to make their development profitable.

Two years after the hearing, J. W. Peterson, of Green River, in a letter of July 1, 1944 (exhibit No. 13), after referring to a recent conversation with Denny about gypsum, stated that the American Gypsum Company, of which he was manager, had just completed a \$40,000 plant for the manufacture of gypsum into rock dust, a safety material for mines, and into rock board and other building materials; that he was interested in the extensive deposits of gypsite and limestone which he had seen on Denny's gypsum claims; that he had found them to be of very good grade and workable with steam shovels, and that he would like to talk with Denny again when he came to town as he "would like to work out a deal with you whereby we can use some of the gypsum from your claims. \* \* \* Be sure and call at the plant when you come in to town."

Nothing seems to have come of Peterson's suggestion. Denny does not state whether he called on Peterson and says nothing as to any further communication with him on this matter. Nor does he offer any proof of the truth of the statements recited. However, even if he were to substantiate them, the evidence confirming them would not be sufficient to establish either the present or the prospective marketability of the gypsum or to overcome the Government's evidence to the contrary. It is obvious, therefore, that Denny has failed to show the marketability of the gypsum and stone and in consequence has failed to establish that the deposits of these materials on his claims are *valuable* mineral deposits which can be claimed under the rules of mining law above stated.

<sup>4</sup> Nowhere else in the record, it may be noted, is there any indication that the locators contemplated the mining of gypsum. Nor is there anything to show that any of the work on any of the claims was ever done for the purpose of developing gypsum or stone, or indeed any of the materials for which the locations were said to be made other than oil. It seems clear that the lands in these claims were not sought for the materials named but for the petroleum which was supposed to underlie them at depth.

As was seen above, proof of valid discovery of gypsum or stone on all these claims would have validated them all for all other placer deposits within their limits and would have made it unnecessary for petitioner to prove individually the discovery of any other placer minerals designated in the location notices, for example, aluminum, clay, and manganese, each designated in some of 15 notices. But Denny's proof as to valuable deposits of gypsum and stone having failed, the claims located for them remained inchoate locations, and the burden of proof as to the discovery of all the other designated minerals continues to rest upon him.

Concerning aluminum, clay, and manganese, Denny has at no time made any rebuttal of the Government's *prima facie* case against them. The 15 locations for these materials were among the 539 claims held void by the Commissioner, and they must continue to be held void unless it be shown that they were ever validated by proof of discovery upon them of any other valuable placer deposit, for example, oil. Denny gives the balance of his petition to an attempt to prove discovery of oil on all the claims. But, as will appear, the Department finds no merit in his contentions. There having been no discovery of oil or any other placer deposit on the aluminum, clay, and manganese claims, the Commissioner was correct in holding them void.

In his present effort to prove discovery of oil on these claims, Denny resorts to a theory which he calls the theory of the known geological facts. He says that "the known geological facts relating to this area in general" prove that there was valid discovery of oil on these claims. He omits here to say when this discovery was made, but since his formal answer to charges asserted that discovery of oil was made sometime before February 25, 1920, and that the locations were valid claims existent on that date, it will be assumed that he does not change that contention here. His letter to the Secretary, transmitting his motion papers, concludes thus:

I think Mr. Ickies [sic] that after you have read the geological reports, and the quotations I have made from geological reports, that you will agree that it should be conceded that there is valid discovery of oil on the claims in question, *under the theory of the known geological facts*, as was accepted by the Department in the Summers case, and as was conceded by the Supreme Court in the Virginia-Colorado case. [Italics supplied.]

The cases mentioned are *Freeman v. Summers, United States, Intervener*, 52 L. D. 201 (1927), and *Ickes v. Virginia-Colorado Development Corp.*, 295 U. S. 639 (1935). The statement that the theory "accepted by the Department in the Summers case" "was conceded by the Supreme Court in the Virginia-Colorado case" has no basis. The two cases are entirely unrelated to each other, and as will appear neither decision aids petitioner's case.

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In the *Summers* case, the issue was the sufficiency of an actual discovery of oil shale in shallow workings and on the surface of certain land in the Glenwood Springs land district in Colorado, situate on the geological structure known as the Green River formation. This formation, which had been the subject of exploration and study<sup>5</sup> for a number of years, was declared by the protestants in the case to be one massive homogeneous deposit, consisting of a single stratum, extending vertically a distance of from 2,700 to 2,800 feet from the rich and concededly commercially valuable mahogany beds at its base to the oil shale exposed on its surface. Further, all sections of its stratigraphic column were declared to contain shale, sandy shale, shale sand, or sand that would yield oil upon destructive distillation. It was contended, therefore, that the whole homogeneous body, or column, was valuable and could be commercially developed; that oil shale found on the surface and in shallow workings on this formation was an integral part of the mass below, and that discovery of the surface shale was a sufficient discovery to satisfy the requirements of the law for a valid location.

With this argument the Department agreed. Concerning the facts, the decision stated the following:

The evidence in this case shows that in this particular area of Colorado the lands contain the Green River formation, and that this formation carries oil shales in large and valuable quantities; that while the beds vary in the richness of their content, the formation is one upon which the miner may rely as carrying oil shale which, while yielding at places comparatively small quantities of oil, in other places yields larger and richer quantities of this valuable mineral.

It then concluded:

In other words, having made his initial discovery at or near the surface, he may with assurance follow the formation through the lean to the richer beds.

Thus finding a valid discovery, the Department held the locations valid and entitled to pass to patent, if otherwise regular.

The ruling thus made in the *Summers* case in no way departs from the basic rules as to what constitutes valid location and valid discovery. Indeed, far from pronouncing any new or unusual doctrine, the Department is here at some pains to show that its decision was reached by the application of well-established principles. It points out that as a condition precedent to a valid location the law requires the mineral to be discovered within the limits of the claim located and the mineral indications to be such as would justify a prudent man in the further expenditure of time and money with reasonable prospect of success. In other words, the law requires that the mineral discovered within the limits of the claim must be in such situation and such formation that

<sup>5</sup> See United States Geological Survey Bulletin No. 729 on Oil Shale of the Rocky Mountain Region, pp. 21 and 36 (1923).

the prospector can *follow* the vein or the deposit to depth with a reasonable assurance that paying minerals will be found. The decision further emphasizes that discovery of an isolated bit of mineral not connected with or leading to substantial prospective values is not a sufficient discovery. Rev. Stat. secs. 2320 and 2329; *Castle v. Womble*, 19 L. D. 455, 457 (1894); *Chrisman v. Miller*, 197 U. S. 313, 321-323 (1905); *Waskey v. Hammer*, 223 U. S. 85, 90-91 (1912); *Lindley on Mines* (3d ed.) sec. 336; *Oregon Basin Oil and Gas Co.*, 50 L. D. 244 (1923).

The *Oregon* decision is particularly significant in its bearing on Denny's claims. There, as in the instant case, it had been argued that certain slight discoveries of oil made in shallow wells in shale or sand near the surface had warranted the prudent man in entertaining reasonable expectation of finding valuable oil deposits at depth. But the Department disagreed, stating that the showing presented failed satisfactorily to establish—

\* \* \* that in either of the wells drilled on the claim there was encountered any formation carrying oil or other mineral in sufficient quantity to impress the land with any value on account thereof, while, on the other hand it is conclusively made to appear that the formations from which oil values are expected to be developed within the limits of the claim exist many hundred feet below, and are wholly unconnected with, the formations penetrated in said wells.

This *Oregon* decision (1923) was somewhat similar to that in *East Tintic Consolidated Mining Co.*, 40 L. D. 271, and 41 L. D. 255 (1912) (On Rehearing). There the Department held that the exposure of substantially worthless deposits on the surface of a claim which from observation and geological inference are supposed to indicate that other and *unconnected* veins or lodes lie at greater depth, does not constitute a discovery within contemplation of the law and is not a sufficient basis for a valid location. In other words, the Department in effect ruled that observation combined with geologic inference cannot be substituted for discovery.

Petitioner, in order to support his contention that valid discovery has been made on his claims in accordance with the theory in the *Summers* case, presents exhibits Nos. 2-8, inclusive, described above. In general, these papers severally examine and discuss, with especial reference to oil and gas possibilities, the general geologic features and surface conditions of selected areas in an extended region of which Denny's claims form but a part. They describe the normal stratigraphic column of this region as comprising 15 separate formations,<sup>6</sup>

<sup>6</sup> In descending order these are as follows:

- |             |               |                          |
|-------------|---------------|--------------------------|
| 1. McElmo.  | 6. Wingate.   | 11. Kiabab.              |
| 2. Entrada. | 7. Chinle.    | 12. Coconino.            |
| 3. Carmel.  | 8. Shinarump. | 13. Rico or Supia.       |
| 4. Navajo.  | 9. DeChelly.  | 14. Hermosa.             |
| 5. Todilto. | 10. Moenkopi. | 15. Lower Pennsylvanian. |



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from the Lower Pennsylvanian, at a depth of as much as 7,700 feet, to the McElmo formation at the earth's surface. They explain that at many points in the region some or all of the uppermost formations, such as the McElmo, the Entrada, and the Carmel, have either entirely disappeared or have been worn down by natural forces acting through millions of years, and that at such points the lower formations are correspondingly nearer the surface and can be reached with less drilling. They study the character of whatever formations they find exposed, and where they find outcroppings or sand showing any signs of oil the authors draw inferences as to the source of the oil and as to which of the many formations at depth may contain commercial quantities. They take scientific measurements and attempt to estimate the aggregate thickness of the several formations which must be penetrated before the drill can reach the formation supposed to be oil bearing. They also describe conditions where wells have been drilled and report the results of the tests. Finally, they offer conclusions as to the points which from surface indications appear to be the most favorable locations for *future* tests.

Petitioner places much reliance on exhibit No. 4, the Prommel-Crum report on the Nequoa Arch underlying the Denny claims. From their observations, Prommel and Crum conclude that the formations on the Arch most likely to contain oil in commercial quantities are five of the *lower* formations. In descending order these are Nos. 8, 9, 10, 13, and 15, namely, Shinarump conglomerate, DeChelly sandstone, Moenkopi red sandstone and shales, Rico or Supia sandstone with interbedded limestone, and the Lower Pennsylvanian sandstone. Of these, the Lower Pennsylvanian, oldest and deepest of the formations, is estimated to lie from 7,155 to 7,710 feet below the earth's surface, where the column is complete. The DeChelly at a point a mile south of Denny's claims showed small quantities of oil only after the drill of the Des Moines well had gone down 3,000 feet.

In this connection, it is to be remembered that the wells drilled by the Duquesne Association were all shallow wells, many only from 50 to 300 feet deep, and that the deepest well drilled went down only 600 feet. Reporting in November 1926 on developments in the San Rafael Desert area, the Geologists Prommel and Crum said of the Duquesne Association's locations:

\* \* \* *No actual test has been made on these placers*, the annual assessment work comprising a number of shallow holes and pits as well as road construction. [Italics supplied; exhibit 4, *supra*, pp. 3 and 13.]

This statement indicates clearly the opinion of geologists, upon whom petitioner greatly relies, that in November 1926, the date of the Prommel-Crum report, no discovery of oil had as yet been made on

the Duquesne placers, and that none was to be expected except from very much deeper drilling.

The substance of the exhibits just outlined shows, therefore, that "the known geological facts" concerning the Nequoia Arch and the area of the Denny claims are entirely different from those leading to the *Summers* decision. No thick, homogeneous oil-bearing stratum like the Green River formation has been found outcropping at the surface here. As the geologists of the exhibits point out, the possible oil-bearing formations here lie at depth, unconnected with the surface, separated from it by unlike strata, and are to be reached only by deep drilling through the intermediate non-oil-bearing formations. The papers present no evidence that seepages or other surface indications in this area have a direct connection with any formation that can be followed from surface to depth, or through lean to rich beds as in the *Summers* case.

Nor is there any common belief among nongeologists that oil seepages occurring sporadically or exposures of sand saturated with oil or other surface indications afford any assurance of continuity of deposit of so fugitive a mineral as petroleum. As is stated in Lindley on Mines (3d ed.) sec. 437, p. 1024, regarding the sufficiency of petroleum discovery—

\* \* \* It is well known that the natural habitat of this class of mineral hydrocarbons is in stratified rocks some distance below the surface, and except for the occasional appearance at the surface in the form of oil seepages, springs, or other indications of the subterranean existence of petroleum, there is nothing to guide the miner in making his location. It requires more or less extensive development in the nature of well-drilling and prospecting to determine the nature, extent, and permanency of the deposit.

See, also, *Southwestern Oil Co. v. Atlantic and Pacific R. R. Co.*, 39 L. D. 335 (1910). Again, explaining the necessity for protecting the occupation of a diligent prospector during his search for oil, the California court in the leading case of *McLemore v. Express Oil Co.*, 158 Calif. 559, 562, 112 Pac. 59, 60 (1910), observed—

\* \* \* discovery, in the very nature of things, would rarely or never be made except at the end of much time and after the expenditure of much money, the discovery of oil involving the erection of a derrick, the installation of machinery and the laborious drilling of a well, frequently to the depth of three thousand feet or more. \* \* \*

Obviously, therefore, the claims in this case are not at all on all fours with those in the *Summers* case. As was stated above,<sup>7</sup> petitioner's answer to the Government's charge of no discovery of oil and his statements at the hearing, both based on information from drillers and other workmen on these claims and not on his own knowl-

<sup>7</sup> Pages 133-135.

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edge, pointed for discovery to the finding of saturated oil sands and pockets of oil in the numerous shallow wells drilled before February 25, 1920, and of globules of oil appearing on the water in the wells when bailing was done. The *Oregon Basin* and *East Tintic* decisions above described make very clear that these meager showings of oil in shallow wells, which did not penetrate or even reach the deep strata designated by the geologists as possibly productive, were wholly insufficient to constitute discovery. The Department therefore maintains its view that the Commissioner was correct in holding that there was no discovery of oil on any of the claims at any time. What it said in the *East Tintic* case is applicable here, that observation combined with geologic inference cannot be substituted for discovery.

As regards the oil claims, one other matter remains for comment, the status of these claims under the Mineral Leasing Act of February 25, 1920. This act effected a complete change of policy with regard to the disposition of lands containing deposits of coal, phosphate, sodium, oil, oil shale, and gas. Thereafter, such lands were no longer to be open to location and acquisition of title but only to leasing. *Wilbur v. Krushnic*, 280 U. S. 306, 314 (1930). In express terms, section 37 of the act (30 U. S. C. sec. 193) directed that deposits of these designated minerals in lands valuable therefor should be subject to disposition only as provided in the act, namely, by leasing; but it made an exception as follows:

\* \* \* except as to valid claims existent at date of the passage of this Act and thereafter maintained in compliance with the laws under which initiated, which claims may be perfected under such laws, including discovery.

Under this exception the claims saved from the operation of the leasing law are of two classes:<sup>8</sup>

1. Claims which *on* February 25, 1920, were *valid* because of sufficient prior discovery and which *after* February 25, 1920, were "maintained" by annual assessment work.

2. Claims upon which *on* February 25, 1920, there had been no prior discovery but upon which *on* that date diligent discovery work was being prosecuted and upon which *after* that date diligent discovery work was continued to discovery.

It is to be noted that before discovery so-called "locations" are not valid locations but only inchoate. As such, they are not subject to the requirement of annual *assessment* work made by section 2324, Revised Statutes, or to the penalty of relocation prescribed by it. Further, so-called assessment work does not take the place of discovery. *Cole v. Ralph*, 252 U. S. 286, 296 (1920). Nor may the doing of it, whether individual or group assessment work, under the *theory* of a

<sup>8</sup> See *McGee v. Wootton*, 48 L. D. 147 (1921).

*valid* mineral location suffice to hold a claim when the claim is actually inchoate. *Union Oil Co. v. Smith*, 249 U. S. 337, 350 (1919). Accordingly, inchoate locations do not fall in class 1 of the exception in section 37. They may, however, fall in class 2; for if discovery work be in progress on February 25, 1920, and be continued to actual discovery, the inchoate locations thus *maintained* will by the doctrine of relation be deemed to have been valid and in existence on February 25, 1920, and therefore saved by the exception from the operation of the Leasing Act.

Denny's claims do not fall in class 1, there having been no prior discovery and the so-called assessment work done having no applicability to inchoate locations and not availing as a substitute for discovery. Nor do they fall in class 2, for no diligent discovery work was in progress on February 25, 1920. The record shows that all drilling for oil ceased in 1918, and that from 1919 to 1926 the only work done was road and rock work and the building of fireplaces for the accommodation of the public. This work was only so-called assessment work, and does not take the place of the diligent discovery work required for the maintenance of inchoate locations. The distinction to be made between the two is emphasized by the Supreme Court of California in the leading case of *McLemore v. Express Oil Co.*, 158 Calif. 559, 562-563, 112 Pac. 59, 60, 61 (1910), where it says:

\* \* \* When the location is valid and complete, the law exacts the doing of but one hundred dollars of work per year, and when that is done all of the locator's rights are fully protected, whether he remains in possession longer than is necessary to do that work or not. *But where the location is incomplete, no question of assessment work is involved.* What the attempting locator has is the right to continue in possession, undisturbed by any form of hostile or clandestine entry, while he is diligently prosecuting his work to a discovery. *This diligent prosecution of the work of discovery does not mean the doing of assessment work.* It does not mean the pursuit of capital to prosecute the work. It does not mean any attempted holding, by cabin, lumber pile or unused derrick. It means the diligent, continuous prosecution of the work, with the expenditure of whatever money may be necessary to the end in view. \* \* \* [Italics supplied.]

In view of all these considerations, the Commissioner, finding that there had been no prior discovery and no diligent discovery work in progress on February 25, 1920, held that the claims were not saved by the exception in section 37 and that they were null and void. He was upheld by the Department in its subsequent decisions.

This action Denny considers a flagrant violation of authority. In support of his position he cites *Ickes v. Virginia-Colorado Development Corp.*, 295 U. S. 639 (1935). That case, however, is not apposite, dealing not with *discovery* work on inchoate locations in class 2 of the section 37 exception but with *assessment* work on *valid* loca-

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tions in class 1 under the exception. The question was as to the "maintenance" of such a valid claim. The Court pointed out that in the case of a valid location *under the mining law* (Rev. Stat. sec. 2324), a default in annual assessment work, although opening the claim to relocation by a third party, does not *ipso facto* forfeit the claim and is without effect insofar as the Government is concerned; that the locator is entitled to resume work before a relocation and that such resumption maintains his claim. The Court then held that these rights of the locator under the mining law are not diminished but saved by section 37 of the Leasing Act; that the owner of a *valid* location is entitled to resume work after a default, and that he *maintains* his claim, within the meaning of the Leasing Act, no less by such resumption than by performance of the annual *assessment* labor.

It is to be noted, however, that although the decision denied the authority of the Secretary to declare the forfeiture of a claim for an *assessment work* default, the Court expressly recognized his authority to determine that an alleged valid claim is invalid for lack of discovery, fraud, or other defect. It is this authority which has been exercised in this case. The claims of discovery for gypsum, stone, oil, and the other materials designated in the location notices, have all been investigated, challenged, and held invalid. Further, it has been found that on the claims explored for oil there had been no discovery and that no diligent discovery work was in course of prosecution on February 25, 1920, and that in consequence these claims were not saved by the exception in section 37 of the Mineral Leasing Act.

The Department therefore finds no reason for disturbing the decisions previously reached that the 539 claims claimed by petitioners are all null and void.

The motion is denied.

OSCAR L. CHAPMAN,  
*Assistant Secretary.*

## INDIAN RIGHTS IN COLUMBIA RIVER RESERVOIR

Indian Rights of Hunting, Fishing, and Boating in Columbia River Reservoir—Statutory Construction—Second Paragraph of Section 1 of Act of June 29, 1940 (54 Stat. 703)—Administration of Columbia River Reservoir Area—Constitutionality of Regulatory Provision of the Act.

The second paragraph of section 1 of the act of June 29, 1940, provides:

"The Secretary of the Interior, in lieu of reserving rights of hunting, fishing, and boating to the Indians in the areas granted under this Act, shall set aside approximately one-quarter of the entire reservoir area for the paramount use of the Indians of the Spokane and Colville Reservations."

hunting, fishing, and boating purposes, which rights shall be subject only to such reasonable regulations as the Secretary may prescribe for the protection and conservation of fish and wildlife: *Provided*, That the exercise of the Indians' rights shall not interfere with project operations. The Secretary shall also, where necessary, grant to the Indians reasonable rights of access to such area or areas across any project lands."

The act imposes a mandatory duty upon the Secretary to set aside approximately one-quarter of the entire reservoir area for the paramount use of the Indians of the Spokane and Colville Reservations.

Although the act in terms permits the Secretary to set aside one or more areas for Indian use, it also makes separate provision for two different tribes of Indians. The Secretary is, therefore, required to allocate at least one area to each of the two tribes. While he may also set aside more than two areas, his power is limited by a rule of reason which would prevent him from setting aside so many areas that he would bring about the very evil which the statute was designed to prevent. The object of the statute was, so to speak, to secure a consolidation of the areas of Indian interest.

The interest of the Colville and Spokane Indians in one-quarter of the reservoir area is not joint but several. In view of the failure of the statute to prescribe a formula for dividing between the two tribes the 25 percent of the reservoir area to be set aside for both of them, the Secretary may make the apportionment in such a manner as will be equitable under all the circumstances. However, the ratio that was employed in determining the percentage of the entire reservoir area that was to be set aside for both tribes could reasonably be applied in determining the share of each tribe. This ratio was obtained by comparing the length of the original river shore line of Indian lands acquired or to be acquired for the reservoir with the total original shore line of the river in the reservoir area. The result would also be in harmony with the relative populations of the Colville and Spokane Indian Reservations.

While the Secretary has discretion in the location of the Indian areas, his discretion in this respect is limited by the requirement that the areas set aside for the Indians be readily accessible to them. The Indian areas must, therefore, be located in reasonable proximity to the Indian lands, namely, adjacent to such lands. The application of this rule would require the location of the Indian areas along the former shore line of Indian lands. However, in view of the scope of the Secretary's discretion, he is under no duty to locate the Indian areas within the exterior boundaries of the reservations as they existed prior to the construction of the reservoir.

The Secretary is not confined to setting aside one-quarter of the water surface of the reservoir for the use of the Indians. He may include freeboard areas in the areas set aside for the Indians because (a) the Indians are given hunting rights which can also be enjoyed on the shorelands; (b) the "entire" reservoir area is made the basis for calculating the Indians' share; (c) the rights of access to the Indian reservoir areas are granted only "when necessary."

The special rights given to the Indians under the act are expressly limited to hunting, fishing, and boating. These rights are not enlarged by the "access" provision of the act, since a right of access is not a separate and independent right but a means of enjoying property rights or special rights otherwise possessed. However, the rights of access are not limited to mere rights of ingress and egress but are commensurate with the purposes to which the portions of the reservoir to be set aside for the Indians are to be put.

No special rights inure to the Indians from any other source. By virtue of the act of July 1, 1892 (27 Stat. 62), the southern and eastern boundary of

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the Colville Reservation extends to the middle of the channel of the Columbia River. By the Executive order of January 18, 1881, the bed of the Spokane River to the south bank thereof was included in the Spokane Indian Reservation. Even if it be assumed that the titles to the beds of the Columbia and Spokane Rivers were not taken and extinguished under the act of June 29, 1940, it cannot be made a source of additional special rights for the Indians. The special rights accorded to the Indians by the act are plainly denominated lieu rights. They are, therefore, to be deemed an exclusive substitute for whatever rights the Indians may have enjoyed prior to the enactment of the statute by reason of their rights of ownership.

However, the Indians are not confined to those parts of the reservoir set aside for their "paramount" use. In such areas of the reservoir they will enjoy special rights. But in the reservoir as a whole, insofar as they may have access to it, they may enjoy such privileges as are accorded to the general public in navigable waters, which include those of hunting and fishing, floating logs, and navigation. The Indians may also take advantage of section 10 of the act of August 4, 1939 (43 U. S. C. sec. 387), which gives the Secretary power to grant leases, licenses, easements or rights-of-way over lands acquired and administered under the Federal reclamation laws.

Since the act declares that the areas set aside for the Indians shall be for their "paramount" use for hunting, fishing, and boating, such use is neither exclusive of the same use by other persons, nor exclusive of any other use by other persons. However, the Secretary is under a duty to maintain the paramount character of the Indian use, and if he finds that this can be accomplished only by according the Indians exclusive rights in the areas set aside for them, he is empowered to do so. He may make such rights exclusive in all parts of the Indian areas, or at particular locations, or at particular times, or give greater freedom to the Indians in making use of the reservoir than is permitted to others.

Since the rights of the Indians will not necessarily be exclusive, there is no present need to decide whether the Indians may license others to enjoy their rights.

Although the Bureau of Reclamation, the Bureau of Indian Affairs, the National Park Service, and the Fish and Wildlife Service are all interested in the Columbia River Reservoir area, its administration is vested in the Secretary of the Interior rather than in any particular bureau, and the Secretary, by virtue of section 161 of the Revised Statutes (now 5 U. S. C. sec. 22), may select any one or more of the interested agencies to administer any part of the reservoir area.

There is no good reason to doubt the constitutionality of the provision of the act, which gives the Secretary of the Interior authority to prescribe reasonable regulations for the protection and conservation of fish and wildlife in the areas set aside for Indian use. The constitutionality of the act is supported by the property interests of the United States in the reservoir area, the power of Congress to control the navigable waters of the United States, and the powers of Congress over Indians and Indian affairs.

M-34326

DECEMBER 29, 1945.

TO ASSISTANT SECRETARY CHAPMAN.

This is in response to your memorandum of January 25, 1944, in which you request that this office consider the legal problems involved in determining the rights of the Indians of the Colville and Spokane

Indian Reservations in the Columbia River Reservoir created by the construction of the Grand Coulee Dam. The rights in question arise under the second paragraph of section 1 of the act of June 29, 1940 (54 Stat. 703). I have considered in this connection the memoranda of the Office of Indian Affairs dated December 30, 1943; of the Assistant to the Secretary in Charge of Land Utilization dated January 7, 1944; and of the Assistant Chief Counsel of the Bureau of Reclamation dated July 4, 1944, as well as other documents in the files of the interested agencies.

The second paragraph of section 1 of the act of June 29, 1940, provides:

The Secretary of the Interior, in lieu of reserving rights of hunting, fishing, and boating to the Indians in the areas granted under this Act, shall set aside approximately one-quarter of the entire reservoir area for the paramount use of the Indians of the Spokane and Colville Reservations for hunting, fishing, and boating purposes, which rights shall be subject only to such reasonable regulations as the Secretary may prescribe for the protection and conservation of fish and wildlife: *Provided*, That the exercise of the Indians' rights shall not interfere with project operations. The Secretary shall also, where necessary, grant to the Indians reasonable rights of access to such area or areas across any project lands.

You apparently request that I consider all the legal problems that can immediately be anticipated as arising under the act so that you may be advised concerning the permissible scope of administrative action. This panoramic assignment, going beyond the specific inquiry to which my opinions are ordinarily addressed, seems at least necessary in part because the agencies interested in the administration of the Columbia River Reservoir area have been unable to agree upon a plan for the development of the area.<sup>1</sup>

The statute imposes a mandatory duty upon the Secretary to set aside "approximately<sup>2</sup> one-quarter of the entire reservoir area for the paramount use of the Indians of the Spokane and Colville Reservations \* \* \*."<sup>3</sup> But it does not, at least in specific terms, supply much guidance to the Secretary in carrying out this duty. In order to extract the full implications of the statutory direction, it is necessary to consider first some aspects of the history of the Colville and

<sup>1</sup> A Memorandum of Agreement for the administration of the reservoir area was signed on September 26, 1941, by representatives of the Colville Indian Agency, the Colville Business Council, the National Park Service, and the Bureau of Reclamation, but it received the approval of neither the heads of the interested agencies nor of the Department.

<sup>2</sup> Hereafter when reference is made to "one-quarter of the entire reservoir area" or to "one-quarter of the reservoir area," the statement should be understood in an approximate sense.

<sup>3</sup> The language of the act is mandatory. It makes use of the imperative "shall," and nothing in the legislative history of the act casts any doubt upon the mandatory character of the language.



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Spokane Indians, and the more immediate events leading to the passage of the act of June 29, 1940.

### 1. THE BACKGROUND OF THE ACT OF JUNE 29, 1940

The Colville Reservation was established by an Executive order of President Grant, dated July 2, 1872, which set aside "the country bounded on the east and south by the Columbia River, on the west by the Okanagon River, and on the north by the British possessions." Pursuant to the act of August 19, 1890 (26 Stat. 336, 355), an agreement was made with the Colville Indians on May 9, 1891, for the cession of the northern half of their reservation for the sum of \$1,500,000. Congress, however, refused to ratify this agreement. The reservation was thereafter diminished, subject to the allotment in severalty of the Indians already residing on the vacated portion, by the act of July 1, 1892 (27 Stat. 62), which described the portion to be vacated as follows:

Beginning at a point on the eastern boundary line of the Colville Indian Reservation where the township line between townships thirty-four and thirty-five north, of range thirty-seven east, of the Willamette meridian, if extended west, would intersect the same, said point being in the middle of the channel of the Columbia River, and running thence west parallel with the forty-ninth parallel of latitude to the western boundary line of the said Colville Indian Reservation in the Okanagon River, thence north following the said western boundary line to the said forty-ninth parallel of latitude, thence east along the said forty-ninth parallel of latitude to the northeast corner of the said Colville Indian Reservation, thence south following the eastern boundary of said reservation to the place of beginning \* \* \*

Section 8 of this act provided that nothing therein should be construed as recognizing the title or ownership of the Indians in any part of the reservation. However, the purpose of this provision appears to have been merely to prevent the assertion of any rights against the United States by the Indians. As the Supreme Court pointed out in *United States v. Pelican*, 232 U. S. 442, 445 (1914), the reservation was repeatedly recognized in subsequent acts of Congress, and was therefore "a legally constituted reservation." Thus the act of March 22, 1906 (34 Stat. 80), made provision for allotments on the diminished reservation and authorized the sale and disposition of the surplus unallotted lands subject to the payment of the proceeds of the sales to the Indians. Indeed, by the act of June 21, 1906 (34 Stat. 325, 377), Congress appropriated the \$1,500,000 contemplated by the agreement of May 9, 1891, in payment of the lands restored to the public domain by the act of 1892.

The Executive order of 1872 had set aside the Colville Reservation not only for the Colville Indians but "for such other Indians as the

Department of the Interior may see fit to locate thereon." Under an agreement of July 7, 1883, ratified by the act of July 4, 1884 (23 Stat. 76, 79), which was made with Chief Moses and other Indians of the Columbia and Colville Reservations, the Columbia River Indians were moved to the Colville Reservation. See *United States v. Moore*, 161 Fed. 513 (C. C. A. 9th, 1908). The act of March 8, 1906 (34 Stat. 55), provided for the issuance of patents to lands allotted under the Moses agreement of July 7, 1883. Chief Joseph and his band of Nez Perce Indians were also settled on the Colville Reservation.

The Spokane Reservation was established by an Executive order of President Hayes, dated January 18, 1881, with boundaries as follows:

Commencing at a point where Chemakane Creek crosses the forty-eighth parallel of latitude; thence down the east bank of said creek to where it enters the Spokane River; thence across said Spokane River westwardly along the southern bank thereof to a point where it enters the Columbia River; thence across the Columbia River, northwardly along its western bank to a point where said river crosses the said forty-eighth parallel of latitude; thence east along said parallel to the place of beginning. \* [1 Kappler 925.]

The act of June 19, 1902 (32 Stat. 744), provided for the allotment of the Spokane Reservation and the opening of the unallotted lands to exploration, location, occupation, and purchase under the mining laws. The act of May 29, 1908 (35 Stat. 458), also provided for allotments, and the opening of the surplus unallotted lands to settlement and entry under the homestead laws. Under an act of March 3, 1905 (33 Stat. 1006), the waters of the Spokane River where it formed the southern boundary of the Spokane Reservation had been made subject to non-Indian appropriation pursuant to the laws of the State of Washington, and the Secretary of the Interior had been authorized to grant allotted and unallotted lands to appropriators when necessary "for the beneficial use of said water."

It should be noted that the boundaries of the Colville Reservation extend to the middle of the bed of the Columbia River. The Department so held in the case of *J. H. Seupelt*, decided May 29, 1914 (43 L. D. 267).<sup>4</sup> It was pointed out in the opinion that while the language of the Executive order of 1872 was not clear, all doubt had been removed by the act of 1892, which ran the boundary from a point "in the middle of the channel of the Columbia River" and referred to the western boundary "in the Okanagon River." This conclusion was supported also by the desirability of protecting "the fishing interests of the Indians, as it is well known that the Indians secure a great

<sup>4</sup> In *Port of Seattle v. Oregon & Washington R. R. Co.*, 255 U. S. 56 (1921), and *Silas Mason Co. v. Tax Commission*, 302 U. S. 186 (1937), the Court held that title to the bed of the Columbia River was in the State of Washington but the cases involved points in the river where no Indian rights existed.

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deal of their subsistence from the fish obtained from the Columbia River." While the disposition of the beds of navigable waters during the territorial period are not favored,<sup>5</sup> the Federal Government has ample power to make such dispositions, and the intention to do so may be inferred in the creation of Indian reservations during the territorial period. The inclusion of tidelands or the beds of navigable waters in Indian reservations has been upheld in the years since the departmental decision in a considerable number of cases.<sup>6</sup> The question in each case is one of intent.

It has also been held in *United States v. Big Bend Transit Co.*, 42 F. Supp. 459 (D. C. E. D. Wash., 1941), that the bed of the Spokane River is part of the Spokane Indian Reservation. The Court declared in this case:

\* \* \* The water of the Spokane River and the bed of the stream to the south bank thereof were included in the Spokane Indian Reservation by Executive Order of January 18, 1881. The State of Washington specifically disclaimed all title to all lands held by any Indian or Indian Tribes provided that the Indian lands should remain under the absolute jurisdiction and control of the Congress. [P. 467.]

Fishing was originally a vital part of the economy of the Colville and Spokane Indians, especially salmon fishing, although they also did some farming. The Spokane Indians had several fisheries along the Spokane River. But the great fishery for all the Indians of this region was at Kettle Falls, which is considerably north of the present northern boundary of the Colville Reservation, and even further north of the Spokane Reservation. Fishing by the Indians at Kettle Falls was a right enjoyed by them in common before the establishment of the reservations.<sup>7</sup> The situation was thus very similar to that which later obtained farther west along the reaches of the Columbia River in Oregon where the Indians "likened the river to a great table where all the Indians came to partake."<sup>8</sup> The Indians have never exercised exclusive fishing rights over the whole of the Columbia River. The ownership of the Colville Indians along most of the river where it bordered their reservation was only to the thread of the stream. Where the Columbia River flowed through the Colville and Spokane Reservations, so as to form a common border of the two reservations and to give them complete ownership of the bed of the river, there

<sup>5</sup> See *Shively v. Bowlby*, 152 U. S. 1 (1894), and *United States v. Holt State Bank*, 270 U. S. 49 (1926).

<sup>6</sup> See *Alaska Pacific Fisheries v. United States*, 248 U. S. 78 (1918); *United States v. Romaine*, 255 Fed. 253 (C. C. A. 9th, 1919); *United States v. Stotts*, 49 F. (2d) 619 (D. C. W. D. Wash., 1930); *Montana Power Co. v. Rochester*, 127 F. (2d) 189 (C. C. A. 9th, 1942); *United States v. Moore*, 62 F. Supp. 660 (D. C. W. D. Wash., 1945).

<sup>7</sup> See Report of the Commissioner of Indian Affairs for 1870, pp. 23-27. On the early history of the Colville and Spokane Indians, see, also, Leslie Spier, "Tribal Distribution in Washington" (General Series in Anthropology, No. 3, 1936).

<sup>8</sup> See *Seufert Bros. Co. v. United States*, 249 U. S. 194, 197 (1919).

appear to have been no fishing locations. In fact, fishing was always at particular sites rather than along the whole river, and this was true also on the tributaries of the river. The San Poil River is the only important fishing stream that flows through the Colville Reservation.

Fishing is now of little importance in the Indian economy, the salmon having largely disappeared as the result of extensive fish-trap operations elsewhere on the river.<sup>9</sup> The construction of the Grand Coulee Dam has been the final step in destroying the salmon fishing. The Columbia River Reservoir will have to be restocked with other fish.<sup>10</sup> On December 2, 1939, the Colville Business Council adopted a resolution calling on the Bureau of Reclamation to compensate the tribe for the destruction of its fishing sites on the San Poil River and at Kettle Falls.

Neither the Colville nor Spokane Reservations were ever very suitable for agriculture. An Indian agent called the reservation established for the Colville Indians by the Executive order of 1872 "mostly a conglomeration of bare, rocky mountains," and another declared, "there is rock enough on the reservation to supply the world."<sup>11</sup>

The present economy of the Colville and Spokane Reservations rests primarily upon the grazing of livestock, and the exploitation of the great timber resources of the two reservations. Of the 3.5 billion feet of lumber on the two reservations, approximately 2 billion feet are located on lands tributary to the Columbia River Reservoir. Some of the range units adjoin the Columbia River Reservoir, and the Indians are to a considerable extent dependent upon its water for their livestock.<sup>12</sup>

The construction of the Grand Coulee Dam was authorized by section 2 of the Rivers and Harbors Act of August 30, 1935. It was estimated that the Columbia Basin project as a whole would cost \$393,000,000.<sup>13</sup> The primary purposes of the project are irrigation, power development, and the improvement of navigation,<sup>14</sup> but it was contemplated also that the reservoir area would afford great recreational opportunities. The Columbia River Reservoir,<sup>15</sup> which

<sup>9</sup> See Hearings before a Subcommittee of the House Committee on Indian Affairs on H. R. 9270 (69th Cong., 1st sess., April 6, 1926), on the claims of the Colville Indians. The Indians claimed damages of \$1,000,000 for the loss of their fishing rights.

<sup>10</sup> See memorandum of March 23, 1940, from Commissioner of Reclamation to the Secretary, and U. S. Department of the Interior, Bureau of Reclamation, Final Report of the Committee for the Study of Problem No. 26, which sets forth a plan for the recreational development of the reservoir area.

<sup>11</sup> See H. Ex. Doc. 1 (part 5), pp. 663-665, 43d Cong., 1st sess. (1873).

<sup>12</sup> See Indian Office memorandum for the Secretary dated December 30, 1943, p. 2.

<sup>13</sup> See House Hearings on Interior Department Appropriation Bill for 1938, p. 1546 (75th Cong., 1st sess.).

<sup>14</sup> See section 2 of the Rivers and Harbors Act of August 30, 1935 (49 Stat. 1028, 1039).

<sup>15</sup> The Columbia River Reservoir is formed not only from the Columbia River but also from its tributaries, including the Spokane River which formed the southern boundary of the Spokane Reservation.

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reaches to the Canadian border, is about 150 miles long, and the total area of the reservoir is approximately 86,000 acres, of which about 5,000 acres are shorelands (at high flood level).<sup>16</sup> Section 1 of the act of June 29, 1940, authorized the acquisition of Indian tribal and allotted lands up to a maximum elevation of 1,310 feet above sea level. The maximum water elevation of the reservoir is 1,290 feet, thus leaving a freeboard margin of 20 feet.

It is important to realize that the acquisition of Indian allotted lands for the reservoir began long in advance of the passage of the act of June 29, 1940, and that some of these lands were inundated prior to their acquisition.<sup>17</sup> The plan at this time was to reserve easements to the Indian owners which would enable them to make use of the reservoir without any limitation upon these uses, and therefore the riparian factor of severance damage was not taken into consideration in appraising the Indian lands, either at this time or subsequently, the lands of Indians and non-Indians alike being appraised upon the same basis.<sup>18</sup> The Indian allotted lands were acquired under memoranda of understanding between the Indian Office and the Bureau of Reclamation approved by the Department on April 6, 1939, and June 14, 1940.<sup>19</sup> Paragraph 7 of the latter memorandum of understanding provided: "Nothing in this agreement shall affect existing hunting and fishing rights of the Indians in the Columbia River Reservoir area intended to be satisfied by the enactment into law of the provisions of the second paragraph of Section 1 of S. 3766 and H. R. 9445 \* \* \* (76th Congress, 3d Session)." Most of the lands along the river acquired for the reservoir were allotted rather than tribal lands,<sup>20</sup> and among the latter were also some ceded

<sup>16</sup> See Indian Office memorandum for the Secretary dated December 30, 1943, p. 1. The "shorelands" are the uninundated lands above the maximum water elevation of the reservoir. They constitute the so-called freeboard area. See first paragraph of section 2 (e), *infra*.

<sup>17</sup> See letter of September 19, 1938, from F. A. Banks, Construction Engineer, to the Commissioner of Reclamation, which states that "several tracts of Indian tribal and allotted land will be partially or entirely flooded during the coming year."

<sup>18</sup> See memorandum from Acting Supervising Engineer to the Commissioner of Reclamation, dated May 1, 1940, and teletype message from the Office of the Construction Engineer at Grand Coulee to the Commissioner of Reclamation, dated September 25, 1945.

<sup>19</sup> There was a supplemental memorandum of understanding of November 7, 1939, with reference to two tracts. The memoranda of understanding recite that some of the lands had already been inundated.

<sup>20</sup> The following figures are given in the table contained in the letter from Acting Commissioner W. Barton Greenwood to the Secretary, dated September 13, 1939:

Colville Reservation:	Acres
Tribal .....	2, 293. 3
Allotted .....	13, 034. 7
Spokane Reservation:	
Tribal .....	1, 105. 1
Allotted .....	2, 481. 8

There is some discrepancy between these figures and those given in a teletype message from the Office of the Construction Engineer at Grand Coulee to the Commissioner of Reclamation, dated September 25, 1945. This states that in all 3,441.94 acres of tribal land and 15,032.89 acres of allotted land were acquired.

lands.<sup>21</sup> Only a small percentage of reservation lands had, however, been allotted.<sup>22</sup> Some of the allotted lands acquired for the reservoir were located in the portion of the Colville Reservation vacated and restored to the public domain by the act of July 1, 1892. After the passage of the act of June 29, 1940, the acquisition of Indian lands under the memoranda of understanding was abandoned and regulations governing the acquisition of Indian lands under the act were approved by the Department on September 3, 1940.

My review of the background of the act of June 29, 1940, would be incomplete without note of the fundamental change of plan that occurred in the course of the consideration of the legislation. Originally, the bill drafted in the Department had merely made the grants of title under the act "subject to the reservation for the Indians of an easement to use such lands for hunting, fishing, boating, and other purposes." This type of provision had a precedent in the act of May 9, 1924 (43 Stat. 117), relating to the American Falls Reservoir which gave similar rights to the Fort Hall Indians.<sup>23</sup>

However, the Bureau of Reclamation, although it had originally accepted a solution of the problem along these lines, later objected to the reservation of easements over the former Indian lands along the Columbia River which did not lie in a contiguous block but were scattered all along the river from Grand Coulee to the Canadian border. Such easements would have given the Indians rights in all parts of the reservoir area, and it was feared that this would interfere with the proper development of its recreational possibilities. The Bureau of Reclamation was also opposed to any grant of easements for unspecified purposes.<sup>24</sup> It proposed therefore that the Indian be given "paramount" rights of use; that these rights be limited to hunting, fishing, and boating; and that they be confined to not more than approximately one-quarter of the entire reservoir area. This figure was derived from the ratio of the original river shore line of Indian lands acquired or to be acquired for the reservoir to the total original shore line of the river in the reservoir area. This idea was first broached in a memorandum of March 23, 1940, from the Commissioner of Reclamation to the Secretary. It was suggested in this memorandum that the following language be included in the bill:

<sup>21</sup> See memorandum from the Assistant Commissioner of Indian Affairs to Commissioner of Reclamation, dated April 15, 1941.

<sup>22</sup> The Statistical Supplement to the Annual Report of the Commissioner of Indian Affairs for fiscal year ended June 30, 1944 (p. 21), indicates that of 1,175,700 acres of land on Colville Reservation, 294,205 are allotted, and that of 137,609 acres of land on Spokane Reservation, 47,988 are allotted.

<sup>23</sup> The grant under this act was made "subject to the reservation of an easement to the Fort Hall Indians to use the said lands for grazing, hunting, fishing, and gathering of wood, and so forth, the same way as obtained prior to this enactment, in so far as such uses shall not interfere with the use of said lands for reservoir purposes."

<sup>24</sup> See memorandum from the Commissioner of the Bureau of Reclamation to the Commissioner of Indian Affairs, dated February 20, 1940.

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\* \* \* The Secretary of the Interior is hereby authorized to designate and set aside not to exceed 25 percent of the entire reservoir area as areas in which the Indians of the Spokane and Colville Reservations shall have, subject to regulation by the Secretary, paramount rights of hunting, fishing, and boating: *Provided*, That the exercise of such rights shall not interfere with project operations; and the grant of lands under this act for reservoir purposes is made subject to the right of said Indians to have access over such lands to the designated areas.

The Commissioner of Reclamation commented thus upon the scheme of the bill:

\* \* \* This is thought desirable so that a study can be made hereafter of the several diverse uses that may be made of the reservoir by the National Park Service, Biological Survey, and the Bureau of Fisheries, as well as the Indians. Based on such a study, a more equitable adjustment of the various interests can be made, taking account of natural advantages of different parts of the reservoir for these diverse interests. The provision that the rights of the Indians in the designated areas shall be subject to regulation is regarded as essential lest the exercise of the granted rights defeat or seriously interfere with the programs of other agencies to have interests in the reservoir area. \* \* \*

In a memorandum of April 5, 1940, the Assistant Commissioner of Indian Affairs made the following comment upon this proposal:

It is desired that certain conservation practices be exercised in the operation of the reservoir with respect to hunting, fishing, and for park purposes. It is recognized, therefore, that while the Indians' rights shall be paramount the Secretary shall have the authority to prescribe reasonable regulations so that the exercise of the paramount rights by the Indians will not destroy the other purposes. This probably can be handled to a large degree through the setting aside of a particular part or parts of the reservoir for the exclusive use of the Indians in exercising their rights, subject, of course, to the primary use of the reservoir for reservoir purposes.

The Assistant Commissioner of Indian Affairs proposed at the same time that the bill be redrafted as follows:

The Secretary of the Interior shall set aside not less than 25 percent of the entire reservoir area for the paramount use of the Indians of the Spokane and Colville Reservations for hunting, fishing, and boating purposes, the exercise of which rights shall be subject to reasonable regulations of the Secretary for the conservation of fishing and wildlife, provided that the exercise of such rights shall not interfere with project operations and in designating such area or areas the Secretary shall when necessary grant to the Indians the right of access across any lands of the project.

In a memorandum of April 10, 1940, from the Commissioner of Reclamation to the Secretary, it was set forth that the Office of Indian Affairs and the Bureau of Reclamation had agreed upon the draft of a bill. This draft is identical with the language of the act of June 29, 1940. The comment made by the Commissioner of Reclamation upon this draft in the memorandum is in substance the same as that

made by the Department in its report on the bill to Congress on May 28, 1940, as follows:<sup>25</sup>

In consideration of the rights they now enjoy within the Spokane and Colville Reservations, provisions are contained in the bill concerning the hunting, fishing, and boating rights of the Indians. In substance, such provisions would require the Secretary of the Interior to set aside an area of approximately one-quarter of the entire reservoir area for the use of the Spokane and Colville Reservation Indians for hunting, fishing, and boating purposes, subject to such reasonable regulations as the Secretary would prescribe and provided that the exercise of such hunting, fishing, and boating rights would not interfere with project operations. The rights of the Indians to use this area for hunting, fishing, and boating, will not necessarily be exclusive rights. The location of this area is left to the discretion of the Secretary of the Interior so that, following a study of several probable diverse uses of the reservoir area by the National Park Service, the Bureau of Biological Survey, the Bureau of Fisheries, and the Indians, there may be an equitable adjustment of these uses which will take account of the natural advantages of the different parts of the reservoir in relation to these uses.

## 2. THE NATURE AND EXTENT OF THE RESERVOIR AREA TO BE SET ASIDE

The act directs the Secretary to set aside "approximately one-quarter of the entire reservoir area for the paramount use of the Indians of the Spokane and Colville Reservations." Five questions need to be considered in determining the nature and extent of this area: (a) Must definite areas be set aside; (b) how many areas may be set aside; (c) must separate areas be set aside for each of the tribes; (d) must the areas set aside be adjacent to reservation lands and within the exterior boundaries of the reservations as they existed prior to the construction of the reservoir; (e) may part of the free-board area be included in the area set aside.

(a) *The setting aside of the areas.*—When the act was being considered, the desirability of setting aside a definite area for the Indians was stressed. Since then the practicality of dividing the reservoir into Indian and non-Indian zones has been seriously questioned not only by people in the Indian Office but also in the Bureau of Reclamation. Indeed, the Indian Office in its memorandum of December 30, 1943, argued that the Indians be given the privileges contemplated by the act "without attempting to delimit certain parts of the reservoir for their use." Such a scheme would, however, have to be rejected as a legal possibility under the act because, unless the area or areas were fixed and capable of definite description, no area or areas would have been "set aside," as is commanded by the statute.

(b) *The number of areas.*—The language of the act in terms empowers the Secretary to set aside one or more areas for the use of the

<sup>25</sup> The departmental report is printed in H. Rept. No. 2350, 76th Cong., 3d sess. (1940), p. 2.



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Indians, provided all the areas set aside do not exceed one-quarter of the reservoir area. While the second paragraph of section 1 of the act speaks of setting aside one-quarter of the "entire reservoir area" in the singular, the reference here is to the total reservoir area from which the Indian area or areas are to be selected. The intention of the statute seems to be plain from the last proviso to this paragraph, which in directing the Secretary to grant the Indians reasonable right of access speaks of "rights of access to such area or areas."<sup>26</sup>

On the other hand, the statute also makes provision for rights of use for two separate tribes of Indians, the Colville and Spokane Indians. Since I conclude in the next section that the interest of the Indians in one-quarter of the reservoir area is not joint but several, the Secretary would be required to allocate at least one area to each of the two tribes. This conclusion is not inconsistent, however, with the language of the statute, which permits the Secretary to set aside one or more areas. The Secretary could set aside areas for the two tribes which would be contiguous, or to put it in another way, the Secretary could subdivide a single area into two parts so that each tribe would be allocated a separate area. The setting aside of a single contiguous area so subdivided would be in harmony with the language of the statute in every respect.

I hold therefore that the Secretary may set aside one or more areas for Indian use. However, the rule of reason must be taken to limit his power in the latter respect. He may not set aside so many areas that he would bring about the very evil which the statute was designed to prevent. The object of the statute was, so to speak, to secure a consolidation of the areas of Indian interest.

(c) *The nature of the interests of the tribes.*—Although the Secretary may set aside one or more areas, the question remains whether he must set aside separate areas for the Colville and Spokane Indians. Each area set aside could be for the joint or several use of the Colville and Spokane Indians. If the setting aside of separate areas had been intended, it would doubtless have been more natural to direct the Secretary to set aside areas for the Colville and Spokane Indians "respectively," and to have provided a formula for dividing between the two tribes the 25 percent of the reservoir area to be set aside for both of them. But this sort of argument would prove altogether too much in the case of a statute that is as ambiguous as the act of June 29, 1940.

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<sup>26</sup> I consider it unimportant that in two communications the Commissioner of Reclamation spoke of the location or use of the "area" in the singular, as did the Department in its final report to Congress under date of May 28, 1940, and in commenting on the enrolled bill on June 26, 1940. See memorandum from the Commissioner of Reclamation to the Secretary of the Interior, dated April 10, 1940; letter from the Commissioner of Reclamation to Congressman Charles H. Leavy, dated April 16, 1940.

In a sense, moreover, the statute does impliedly make the necessary provisions. If more than one area may be set aside, then it is more reasonable to suppose that separate areas should be set aside for each tribe. The ratio that was employed in determining the percentage of the entire reservoir area that was to be set aside for both tribes could reasonably be applied in determining the share of each. This ratio would give approximately one-quarter of the Indian areas of the reservoir to the Spokane Tribe.<sup>27</sup> The population of the Spokane Indian Reservation is also about one-quarter of that of the Colville Indian Reservation.<sup>28</sup> The total land areas of the two reservations are quite disproportionate, the Colville Reservation being at least 10 times as large as the Spokane Reservation,<sup>29</sup> but this factor would seem to be of no great importance. While I do not hold, in view of the silence of the statute in this respect, that the Secretary is bound to adopt any particular formula, their availability facilitates any apportionment by the Secretary of the total Indian area in such a manner as would be equitable under all the circumstances.

It should be remembered that the Colville and Spokane Indians are separate tribal groups with separate reservations and that they had separate rights in the lands of the reservations and in the waters flowing through or bordering upon their reservations, although they did have a common border on part of the Columbia River. In the absence of a plain indication in the statute that the rights to be accorded were to be enjoyed in common, a construction should not be indulged which might lead to complexities and difficulties in the relations between the two tribes. If the Secretary were required by the statute to set aside a single area, it would complicate the problem of making the area accessible to both tribes.<sup>30</sup> Indeed, the Secretary might select an area that would lie at least partly within the exterior boundaries of the Colville Reservation. One of the tributaries of the Columbia River, the San Poil River, which forms part of the reservoir system, flows entirely through the Colville Reservation. I hold therefore that the Secretary is empowered to allocate at least one area to each of the two tribes, and that the implications of the statutory provisions are best realized if this be done.

(d) *The location of the areas.*—The answer to this question is not as simple as it seems. The statute does not say directly that the areas to be set aside by the Secretary must be adjacent to reservation lands or

<sup>27</sup> See *supra*, footnote 20.

<sup>28</sup> In the Statistical Supplement to the Annual Report of the Commissioner of Indian Affairs (p. 12), the population of the Colville Reservation is given as 3,501, and that of the Spokane Reservation as 925.

<sup>29</sup> In the same Statistical Supplement (p. 21), the total area of the Colville Reservation is given as 1,175,700 acres, and that of the Spokane Reservation as 137,609.

<sup>30</sup> See the discussion of this question, *infra*, in subdivision (d).

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that the areas must lie within the exterior boundaries of the respective reservations as they existed prior to the construction of the reservoir. The legislative history of the statute shows that its purpose was to give the Secretary discretion in determining the location of the reservoir area in which the Indians were to be given special rights. Thus the departmental report states:

The location of this area is left to the discretion of the Secretary of the Interior so that, following a study of several probable diverse uses of the reservoir area by the National Park Service, the Bureau of Biological Survey, the Bureau of Fisheries, and the Indians, there may be an equitable adjustment of these uses which will take account of the natural advantages of the different parts of the reservoir in relation to these uses.

However, the discretion of the Secretary is not unlimited, and must be exercised in a reasonable manner. The areas to be set aside are for the use of the Indians, and they must be put in a position to make use of them. The departmental report itself recognizes that the Indian use is to be considered in locating the areas to be set aside. The Columbia River Reservoir runs all the way to the Canadian border from the northern boundaries of the Colville and Spokane Reservations. To locate the Indian area or areas near the Canadian border, for example, would be to make them practically inaccessible to the Indians. The act itself grants the Indians access across project lands to the areas set aside for them, but this right of access might be rendered wholly nugatory by the location of these areas at places which could not be reached from the Colville and Spokane Indian Reservations. The Indians would then need rights of access also across considerable areas of privately owned lands, which they could acquire only by purchase. To make the rights of access real, the Indian areas of the reservoir must therefore be located in reasonable proximity to the reservations, which is to say that they must be adjacent to or near the reservation lands. Other things being equal, this means that they should be located along the former shore line of the Indian lands.

In considering the location of the reservoir areas to be set aside, I have spoken throughout of "reservation lands" rather than of Indian lands. The record shows, however, that a number of scattered off-the-reservation allotments lie far to the north of the boundaries of the Colville Reservation along the Kettle and Columbia Rivers. I have no information concerning whether these allottees still maintained their affiliations with the Colville Tribe at the time their lands were acquired, nor do I know where or whether they have been re-located. In view of the fact that these allottees could never have had any special rights in the Kettle and Columbia Rivers at the points at which they were located, I do not believe that it can be said that the

Secretary is under a duty to locate an area adjacent to these former Indian lands, although I suppose that if in fact these allottees have relocated in close proximity to the present reservoir the Secretary would not be barred from doing so.

I think, too, that it cannot be maintained, in view of the scope of the Secretary's discretion, that he is under a duty to locate the Indian areas within the exterior boundaries of the reservations as they existed prior to the construction of the reservoir. This would seem to follow from the possibility of establishing an area for off-the-reservation allottees, as well as from the fact that the areas to be set aside are for the paramount rather than the exclusive use of the Indians. Since the Indian rights of use are not necessarily exclusive,<sup>31</sup> there would not seem to be much point in confining the Indian areas within the exterior boundaries of the reservations, which in the case of the San Poil and Spokane Rivers would make it possible to set aside areas running entirely across the streams, and in the case of the Columbia River would make it possible to extend any area or areas set aside to the middle of the channel of the river. However, in view of the constitutional question that has been raised,<sup>32</sup> I think there would be a distinct advantage in locating the Indian areas in such a way that they would lie within the exterior boundaries of the reservations. If this were done, it would help to avoid the constitutional question. It should, however, expressly be noted that I do not believe that one rather than the other construction is indispensable in maintaining the constitutionality of the act, or is required by the rule that where a statute is susceptible of two constructions by one of which grave constitutional questions may arise, and by the other of which such questions may be avoided, construction should favor the latter.<sup>33</sup>

(e) *The inclusion of the freeboard area.*—The first paragraph of section 1 of the act of June 29, 1940, permitted the taking of Indian lands for reservoir purposes up to a maximum elevation of 1,310 feet above sea level.<sup>34</sup> That elevation is, however, approximately 20 feet above the maximum water surface elevation of the reservoir. While this difference in elevation is small, the area of shoreland above the maximum water surface elevation of the reservoir may be quite extensive, depending on the contour of the land above this elevation.

The language of the act is helpful although not conclusive on the question of the inclusion of the freeboard area. The term "reser-

<sup>31</sup> See *infra*, section 3 (b).

<sup>32</sup> See *infra*, section 5.

<sup>33</sup> See *United States v. Delaware & Hudson Co.*, 213 U. S. 366, 407 (1909); *Addy Co. v. United States*, 264 U. S. 239, 245 (1924); *Missouri Pacific R. R. Co. v. Boone*, 270 U. S. 466, 471 (1926).

<sup>34</sup> This section was amended by the act of December 16, 1944 (58 Stat. 813), to permit the acquisition of Indian lands also for operation and maintenance of the reservoir.

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voir area" alone does not necessarily include the freeboard area. According to its dictionary meaning, a reservoir is a basin, either natural or artificial, for collecting and maintaining a supply of water. The "reservoir area" may therefore be only the area covered by the water of the reservoir. The term "reservoir area" does not seem to be an engineering term with a fixed and definite meaning. Diligent search has failed to uncover its use as such in other reclamation legislation. The Construction Engineer at the Grand Coulee Dam, Mr. F. A. Banks, seems to have expressed the opinion, moreover, that the freeboard area is not to be regarded as part of the reservoir area.<sup>35</sup> However, the statute does not speak merely of the "reservoir area." It refers to the "entire" reservoir area, and it may be that the addition of this word was intended to emphasize that the reservoir area was to be deemed to include the freeboard area, as well as the water surface area of the reservoir. Otherwise, the word would be surplusage, and there is a familiar rule of construction that every word in a statute is to be given meaning if at all possible.

The statute also gives the Indians hunting rights in the reservoir areas to be set aside for them. Such rights could be exercised on land as well as water. Although the freeboard area may not now be valuable for hunting, since it must have been practically stripped of game in the process of clearing the land while the project was under construction, the possibility exists that it may be made valuable for such a purpose by the establishment of game refuges in the freeboard area, or by its reforestation, and no construction should be indulged which might deprive the Indians of any future game resources.

The fact that the act provides the Indians with a right of access to the reservoir area to be set aside for them does not in itself rule out the inclusion of part of the freeboard area. I must attach considerable weight to the presence of the words "where necessary" to the clause providing for access to the reservoir area or areas. It reads, "The Secretary shall also, where necessary, grant to the Indians reasonable rights of access to such area or areas across any project lands." It seems to have been assumed therefore that in some circumstances it would not be necessary to grant rights of access. Such could be the case only if shorelands were included in the reservoir areas. If such shorelands adjoined Indian lands, no right of access would be necessary. However, a right of access would *always* be necessary if "reservoir area" meant only the water surface of the reservoir, for the freeboard area would everywhere separate the waters of the reservoir from Indian lands.

<sup>35</sup> See his memorandum to the Commissioner of Reclamation dated February 26, 1944, par. 3.

Finally, I must point out that even if any part of the freeboard area were entirely useless to the Indians for hunting purposes, it would nevertheless possess some value for them in affording greater security to them in obtaining access to the water surface of the reservoir. It would be one thing to have only a right of access to a particular freeboard area, but quite another to have the area set aside for their use, especially since the Secretary might make such use exclusive.<sup>36</sup>

The legislative history of the act is inconclusive upon the question whether the freeboard area may be included in the areas to be set aside for the Indians. In the early stages of the consideration of the legislation, the Indian Office and the Bureau of Reclamation thought in terms of allowing the Indians to use "the lands and reservoir"<sup>37</sup> or the "lands and the waters thereon."<sup>38</sup> But at this time the Bureaus were also thinking in terms of the reservation of easements and of permitting the Indians to make use of the reservoir area for such a purpose as grazing—a plan that was finally abandoned. However, even under the plan actually adopted, the Indians would have rights in "lands and waters" if no part of the freeboard area were included in the areas set aside for them, since the shorelands below the maximum water elevation would not always be inundated. On the other hand, in the basic memorandum of March 23, in which the scheme of the present act was first suggested, the Commissioner of Reclamation himself made use of the term "reservoir area" in a sense which suggests that it may have been intended to include the freeboard area. He spoke of "the need for regulation of the Indian hunting rights in relation to game refuges that might be established in the *reservoir area*." [*Italics supplied.*] However, a refuge for wild fowl would also be a game refuge, and it could be part of the water surface area of the reservoir.

Under all these circumstances, I am not disposed to favor a construction that would limit the Secretary's discretion in this respect in setting aside the Indian reservoir areas, and I hold therefore that the Secretary may include freeboard areas in the areas to be set aside for the Indians.

### 3. THE CHARACTER OF THE INDIAN RIGHTS UNDER THE ACT

Four questions relating to the character of the Indian rights under the act have been raised: (a) Whether the rights of the Indians are confined to hunting, fishing, and boating; (b) whether the charac-

<sup>36</sup> See *infra*, section 3 (b).

<sup>37</sup> Indian Office letter of September 13, 1939, to the Secretary.

<sup>38</sup> Draft of bill submitted by the Bureau of Reclamation to the Indian Office on February 20, 1940.

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terization in the statute of the Indian use as "paramount" makes the Indian rights of hunting, fishing, and boating exclusive rights; (c) whether the Indian rights are personal rather than assignable; (d) whether the Indians may be required to pay license fees in connection with exercising their rights under the act.

(a) *The extent of the Indian rights.*—The Indian Office emphasizes the desirability of the Indians also having grazing rights, and of being able to make use of the reservoir in connection with their logging operations. The enjoyment of such privileges would undoubtedly be of much greater value to the Indians than those specifically mentioned in the act, namely, hunting, fishing, and boating. The question is whether the Indians may use the reservoir for any other purposes.

During the drafting period of the bill, the Indian Office sought to secure the acceptance by the Bureau of Reclamation of a form of bill which would have granted to the Indians easements for "hunting, fishing, boating, and other purposes." In its memorandum of February 20, 1940, the Bureau of Reclamation, in objecting to this proposal, thus explained the reasons for its objection:

\* \* \* This language is at variance from that proposed in the memorandum of your Assistant Commissioner of November 4, 1939. The language proposed by your office named certain specific rights and added a general reservation "for other purposes" not inconsistent with the use of the lands and waters for reservoir purposes. We have omitted this general reservation, have provided that the reserved rights are to be exercised subject to regulation by the Secretary of the Interior, and have more clearly defined the group of Indians entitled to exercise the rights. All of these limitations on the reserved rights are, in my opinion, desirable and necessary. This is particularly true in view of the policy of the Department to sponsor the greatest possible development of reservoirs, such as the Columbia River Reservoir, through such agencies as Biological Survey, Bureau of Fisheries, and the National Park Service. In order for these agencies to plan their work effectively it is necessary that the limits of the reserved rights be clearly defined.

The words "and other purposes" were subsequently eliminated from the act. If the scheme of the act had remained the same, it could hardly be argued that it was intended to permit the Indians to make use of the reservoir for other purposes than those specifically mentioned in the statute.<sup>39</sup> However, although the scheme of the statute was subsequently changed from a reservation of easements across the Indian lands acquired to a grant of rights in a portion of the reservoir area, there is no evidence in the legislative history file bearing on the question of the effect of the change upon the uses to which the area to be set aside might be put.

<sup>39</sup> Such a construction would be reinforced by the doctrine *expressio unius est exclusio alterius*. See Crawford, *Statutory Construction*, sec. 195.

Nevertheless, in the absence of such evidence, I am bound to assume that the Indian rights in the areas to be set aside were not to be enlarged, unless the possibility of enlargement is suggested by the language of the act. Despite the change in plan, only rights of hunting, fishing, and boating were enumerated in the act. It is true that the provision for access made in the last sentence of the second paragraph of section 1 of the act does not expressly say that the rights of access are to be granted "to enable the Indians to exercise their rights of hunting, fishing, and boating." But the addition of such language would have been superfluous, since a right of access is not a separate and independent right but a means of enjoying property rights or special rights otherwise possessed. The right of access cannot, therefore, be made the basis of additional special rights in the areas set aside for the Indians for purposes not mentioned in the statute. However, I should point out that the rights of access would not be limited to mere rights of ingress and egress, but should be commensurate with the purposes to which the portions of the reservoir to be set aside for the Indians are to be put.<sup>40</sup> Thus the Indians would have the right to construct a reasonable number of docks in connection with their boating operations and to erect such structures as may be necessary in connection with their hunting and fishing activities.

There still remains the question, however, whether there are not other rights that inure to the Indians apart from the provisions of the act of June 29, 1940. Apparently the Bureau of Reclamation, in acquiring the allotted and tribal lands under the act, did not specifically acquire title to such portions of the river bed as were beneficially owned by the Indians, and the appraisals did not specifically include any allowances based upon the ownership of the river bed. The allottees themselves had no title to the river bed, owning the uplands only.<sup>41</sup> Even if the title of the tribe to the river bed abutting the uplands survived allotment,<sup>42</sup> there was still no particular reason why the Bureau of Reclamation should have acquired title thereto. The United States has a servitude for the improvement of navigation in the beds of all navigable waters,<sup>43</sup> and the Columbia River had been

<sup>40</sup> *Reining v. New York, L. & W. Ry. Co.*, 13 N. Y. S. 238 (1891); *Heyman v. Biggs*, 150 N. Y. S. 246 (1914); *Town of Brookhaven v. Smith*, 188 N. Y. 74, 80 N. E. 665 (1907); *Alaska Juneau Gold Mining Co. v. Northern Lumber Mills*, 5 Alaska 269 (1915); 45 C. J., pp. 501-502.

<sup>41</sup> The grant of title to allotted lands will be construed in accordance with State law (*Hall v. Hobart*, 186 Fed. 426 (C. C. A. 8th, 1911); *Shively v. Bowlby*, 152 U. S. 1 (1894); *Producers Oil Co. v. Hanzon*, 238 U. S. 325 (1915)), and in the State of Washington the owner of upland does not have title to the bed of navigable waters.

<sup>42</sup> It appears to have been held in *United States v. Ashton*, 170 Fed. 509, 517 (C. C. W. D. Wash., 1909), *app. dismissed*, *sub nom. Bird v. Ashton*, 220 U. S. 604 (1911), that allotment extinguished any tribal title.

<sup>43</sup> *Lewis Blue Point Oyster Cultivation Co. v. Briggs*, 229 U. S. 82 (1913); *Greenleaf Lumber Co. v. Garrison*, 237 U. S. 251 (1915); *Luther J. Bailey et al. v. The United States*, 62 Ct. Cl. 77 (1926).



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held to be navigable.<sup>44</sup> The same servitude existed with respect to the tributaries of the Columbia River even though they may not have been navigable in themselves.<sup>45</sup> Moreover, the United States in improving navigation could cut off the Colville and Spokane Indians from access to deep water without making compensation.<sup>46</sup> The existence of these servitudes permitted the construction of the dam and reservoir without acquisition of title.

Nevertheless, whatever title the Colville and Spokane Tribes had in the beds of the Columbia and Spokane Rivers would not be destroyed by the mere exercise of the servitude for the improvement of navigation.<sup>47</sup> I think, however, that I need not decide the rather puzzling and difficult question of the survival of this title in the process of taking,<sup>48</sup> since I am convinced that it could not be made a source of additional special rights for the Indians. It seems to me apparent from the whole history of the statute, as well as from its terms, that the scheme of rights provided therein was intended as an exclusive substitute for whatever rights the Indians may have enjoyed before its enactment by reason of their rights of ownership. The rights are plainly denominated lieu rights in the statute itself, which provides that the areas to be set aside for the Indians are to be "in lieu of reserving rights of hunting, fishing, and boating to the Indians in the areas granted under this Act." Even if I were to hold the contrary, it would merely necessitate the acquisition of title to the river beds for the taking of which the act would supply ample authority. But I see no necessity for this, because the special rights granted to the Indians under the act were themselves obviously deemed to be a form of compensation for the riparian rights of the Indians for which no separate compensation had been made. To put it in another way, even if it be assumed theoretically that the Indians have title to a portion of the river bed, it is an entirely naked title, since Congress plainly intended to give the Indians only rights of hunting, fishing, and boating in such portions of the reservoir as should be set aside for them by the Secretary. Moreover, the ownership of the river bed would not give the Indians any right to use the waters of the reservoir itself for such

<sup>44</sup> *Continental Land Co. v. United States*, 88 F. (2d) 104 (C. C. A. 9th, 1937), which also relates in some detail the plans for the construction of the Grand Coulee Dam and the Columbia River Reservoir.

<sup>45</sup> *Appalachian Electric Power Co. v. Smith*, 4 F. Supp. 6 (D. C. W. D. Va., 1933), *reversed* 67 F. (2d) 451 (C. C. A. 4th, 1933), and *cert. denied* 291 U. S. 674 (1934).

<sup>46</sup> *Scranton v. Wheeler*, 179 U. S. 141 (1900); *United States v. Appalachian Electric Power Co.*, 311 U. S. 377 (1940).

<sup>47</sup> *James v. Dravo Contracting Co.*, 302 U. S. 134, 140 (1937).

<sup>48</sup> While the bed of a stream may be separately owned from the uplands, the ordinary rule is that, unless a contrary intention is clearly expressed, the conveyance of title to the upland carries with it the title to the bed of the stream. See 45 C. J., pp. 568, 569, and authorities there cited. The application of this rule here, however, would be uncertain because title was not conveyed but taken.

purposes as stock watering and the floating of logs, since the waters of a navigable stream are "in no sense private property."<sup>49</sup>

It does not follow from these views, however, that the Indians may not use the Columbia River Reservoir for any other purpose than hunting, fishing, and boating, and that they may not venture forth into parts of the reservoir area which have not been set apart for their paramount use. Apart from their special rights in the areas set aside for them, they may, of course, enjoy such privileges as are accorded to the general public. They may exercise such privileges as the law allows the public in navigable waters and obtain such rights in the shorelands as the Secretary may grant to any member of the public under existing law, and upon the same terms and conditions. Section 10 of the act of August 4, 1939 (53 Stat. 1187, 1196; 43 U. S. C. sec. 387), provides:

The Secretary, in his discretion, may \* \* \* grant leases, licenses, easements, or rights-of-way, for periods not to exceed fifty years, affecting lands or interests in lands withdrawn or acquired and being administered under the Federal reclamation laws in connection with the construction or operation and maintenance of any project. Such permits or grants shall be made only when, in the judgment of the Secretary, their exercise will not be incompatible with the purposes for which the lands or interests in lands are being administered, and shall be on such terms and conditions as in his judgment will adequately protect the interests of the United States and the project for which said lands or interests in lands are being administered.

Thus the Secretary, exercising his powers under this act, may grant permits to the Colville and Spokane Indians to use the reservoir area for grazing, stock watering, and logging sites, and may make such charges for these privileges as are exacted when similar applications are made by non-Indians. Thus, too, the Indians may navigate any of the waters of the reservoir and fish and hunt thereon, as well as float logs on the reservoir, for these are public rights in navigable waters,<sup>50</sup> although the extent to which they will be able to enjoy these privileges will depend on their ability to secure access to the reservoir. They may also enjoy such privileges in the use of the shorelands as are accorded to the general public.

(b) *The meaning of "paramount use."*—It has been argued that the hunting, fishing, and boating uses assured to the Indians under the act in the areas to be set aside for them are neither exclusive of the same uses by other persons, nor exclusive of other uses by other persons. The uses have even been described as merely "preferential."<sup>51</sup> It is true that the rights of the Indians would not be wholly

<sup>49</sup> See *United States v. Appalachian Electric Power Co.*, 311 U. S. 377, 424 (1940).

<sup>50</sup> See 22 Am. Jur., pp. 674, 678; 34 Am. Jur., pp. 528-529; 45 C. J., pp. 444-445; 26 C. J., pp. 602, 604; 27 C. J., p. 944; 38 C. J., pp. 203-205, and authorities there cited.

<sup>51</sup> See memorandum of Assistant Chief Counsel of the Bureau of Reclamation to the Solicitor, dated July 4, 1944.

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nugatory if the act were construed to give them "preferential" rights only. It could then be argued that such rights could not be regulated to the point of complete prohibition as could any privileges granted to the general public, and also that such rights could not be burdened with a charge in the form of license fees.

The act declares that the area to be set aside shall be for the "paramount" use of the Indians. It may be conceded that the reliance upon the adjective "paramount" alone in this context was probably unfortunate. The adjective played a great role in the feudal land law, and in American legal terminology it has been employed primarily with reference to the "paramount" authority of the Federal Government in the American constitutional scheme. The complexities and perplexities of both feudalism and federalism should constitute a sufficient warning that a "paramount" use is a somewhat elusive concept. A paramount right is one that is superior to all others, but this necessarily implies that others may have rights in the same thing, and, in any event, the question always remains in what respects the right is paramount, for it may be a right to present enjoyment, or a reversionary right, and it may be subject to limitations.

The act itself, however, does not define the sense in which "paramount" is employed, and the legislative history relating to this question is rather confusing.<sup>52</sup> A clue to this sense is, however, to be found in a sentence in the Department's report on the bill which reads: "The rights of the Indians to use this area for hunting, fishing, and boating, will not necessarily be exclusive rights." This statement clearly implies that it was contemplated that there might be circumstances in which the Indian rights could be made exclusive. The adjective "paramount" rather than "exclusive" must have been employed in the act only because in an absolute sense the Indian rights could not be exclusive. This arose from the fact that the Indians would be granted rights in a reservoir which was constructed primarily for other purposes, namely, for irrigation, power development, and the improvement of navigation. The act also contained the proviso, "That the exercise of the Indians' rights shall not interfere with project operations," and made the hunting and fishing rights expressly subject to regulation by the Secretary. The subordination of the Indian rights to project operations, and the subjection of these rights to regulation, need not have prevented them, however, from being denominated "exclusive" rights; there may have been misunderstanding on this score.

<sup>52</sup> There does not appear to have been any real meeting of the minds on this question. In his memorandum of April 5, 1940, to the Secretary, the Assistant Commissioner of Indian Affairs spoke of setting apart "part or parts of the reservoir for the exclusive use of the Indians in exercising their rights." There is no evidence, however, that this idea was accepted by the Bureau of Reclamation.

It can hardly be doubted that the whole reservoir area, including the Indian area, is subject to the public right of navigation. But there are other uses to which the Indian area could be put without interfering with the Indian rights of hunting, fishing, and boating. Such uses might be both of a commercial and recreational character. An example of the former use would be the floating of logs obtained in lumbering operations, and examples of the latter would be the use of the reservoir for swimming, and of the reservoir area for camping. In view of all of these possibilities, it would not be reasonable to hold that it was intended to make the exercise of the Indian rights in the Indian area of the reservoir exclusive of other uses by other persons unless experience showed that these uses so interfered with the Indians' exercise of their rights that these other uses by other persons would have to be curtailed or abolished by the Secretary.

Indeed, the real purpose of the statute seems to have been to give to the Indians directly neither "preferential" nor "exclusive" rights. It was rather to give a power to the Secretary to make the Indian rights exclusive where necessary to insure the realization of their privileges. In the absence of the declaration in the statute that the rights of use of the Indians in the reservoir area were to be paramount, the Secretary, as a public officer administering the project, could have given special rights to no one. But the declaration having been made, the Secretary, while under no absolute duty to give the Indians exclusive rights of hunting, fishing, and boating, is empowered to do so, as well as to curtail the rights which non-Indians might exercise in the areas of the reservoir set apart for their use. However, the Secretary would be under a duty to make the rights of the Indians exclusive whenever he found as a fact that the protection of the Indians in the exercise of their rights made such a step necessary. Thus, while the rights of the Indians would "not necessarily be exclusive rights," they might be made exclusive rights. That the statute contemplated such a flexible scheme is suggested not only by its language but by the nature of the rights themselves and the problems inherent in according them protection.

In a sense, there can really be no exclusive fishing rights in a portion of a reservoir.<sup>53</sup> The setting aside of various areas of the reservoir for the Indians will not imprison the fish in those areas, which can also be taken from the adjoining areas, and somewhat similar considerations apply to the hunting of waterfowl from the surface of the reservoir. Conceivably, too, a distinction might be made be-

<sup>53</sup> In *United States v. Sturgeon*, Fed. Cas. 16413, 6 Sawy. 29 (D. C. D. Nev., 1879), the Court said, in speaking of fishing in a lake wholly within the boundaries of an Indian reservation: "It is plain that nothing of value to the Indians will be left of their reservation if all the whites who choose may resort there to fish." But, obviously, such a consideration would be inapplicable to fishing in part of a reservoir.

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tween offshore fishing from specified locations, and fishing by boat from the surface of the reservoir, and the Indians might be given the primary right of selecting the offshore fishing locations. Distinctions might also be made as to permissible methods and periods of fishing to the advantage of the Indians in their area of the reservoir.

Boating presents a somewhat different problem from hunting and fishing, since the Indian areas can in no sense be depleted by the movement of pleasure boats over their surface, although, of course, excessive boating might interfere not only with the same use by the Indians but also with their hunting and fishing. Conceivably, too, a distinction might be drawn between "boating" which, according to its dictionary meaning, means rowing or sailing primarily for pleasure or as a pastime, and the use of navigable waters for the purposes of trade or commerce.<sup>54</sup> The latter has anciently been said to be the test of navigability, although the more modern and better view, supported by an increasing number of cases, is that boating is an instance of public navigation,<sup>55</sup>—a view based on the persuasive consideration that the recreational uses of a body of navigable water are as important to the public as the commercial. Thus, while through commercial traffic would in any event have to be allowed to pass through the Indian area of the reservoir, mere pleasure boating, which was confined to the Indian area of the reservoir, could be prohibited.

All these factors may be considered by the Secretary in the exercise of his judgment and discretion. The problem involved here is primarily administrative, and the Secretary's discretion is limited only by his duty to maintain the paramount character of the Indians' rights of use.

(c) *The power of the Indians to license their rights.*—In view of the conclusion that the rights of the Indians to use the reservoir for hunting, fishing, and boating are not necessarily exclusive, it would seem unnecessary at this time to decide the question whether these rights are merely personal, so that the general public may not be licensed by the Indians to enjoy them. No practical problem of licensing by the Indians would probably arise with respect to these activities unless the Secretary should make them exclusive rights, and unless the Indians should then wish to license their use by others. The resulting legal problem is as difficult as it is hypothetical, and I prefer not to resolve an issue which may never arise.

<sup>54</sup> See 45 C. J., p. 410, § 6 of title "Navigable Waters": "It is generally, but not in all jurisdictions, held that the stream must be navigable for some useful purpose, such as trade or agriculture, rather than for mere pleasure, and must be capable of sustaining more than small boats such as rowboats or small skiffs or launches."

<sup>55</sup> See *Lamprey v. Metcalf*, 53 N. W. 1139 (Minn., 1893); *State v. Korner*, 148 N. W. 617 (Minn., 1914); *Willow River Club v. Wade*, 76 N. W. 273 (Wis., 1898); *Diana Shooting Club v. Husting*, 145 N. W. 816 (Wis., 1914); *Nekoosa Edwards Paper Co. v. Railroad Commission*, 228 N. W. 144 (Wis., 1929).

(d) *The authority to impose license fees.*—The question whether the Secretary may require the Indians to pay license fees in connection with their hunting, fishing, and boating activities in the areas set aside for them must clearly be answered in the negative. A somewhat similar problem was presented in *Tulee v. Washington*, 315 U. S. 681 (1942), with respect to the treaty rights of the Yakima Indians to fish at their "usual and accustomed places" on ceded lands without paying license fees to the State of Washington. The Court held that the State could not burden the treaty right by imposing license fees. It is true that this ruling is not precisely in point here. No treaty right is involved, and the question presented is one of Federal rather than State regulation. Nevertheless, the liberal approach of the Supreme Court to the problem is not without significance here. Furthermore, the Court expressly pointed out<sup>56</sup> that "the imposition of license fees is not indispensable to the effectiveness of a state conservation program." The same would seem to be true of a Federal conservation program. But all room for doubt is removed by the provision of the act itself. After making the grant of the rights, the act expressly provides that they "shall be subject *only* to such reasonable regulations as the Secretary may prescribe for the protection and conservation of fish and wildlife." [Italics supplied.] The Secretary may not charge the Indians a fee for hunting and fishing privileges because it would be unnecessary to an effective conservation program, and he may not charge the Indians a fee for boating because such an exaction would not be within the restricted power given to him under the act.

#### 4. THE ADMINISTRATION OF THE RESERVOIR AREA

No less than four agencies of the Department are interested in one way or another in the administration of the Columbia River Reservoir. These agencies are the Bureau of Reclamation, the Bureau of Indian Affairs, the National Park Service, and the Fish and Wildlife Service. At present the reservoir area as a whole is being administered by the National Park Service under a temporary arrangement. The Indian Service requests that it be entrusted with the administration of whatever areas are set apart for the Indians.

The problem of administrative jurisdiction presents for consideration only a question of policy. If the applicable legislation expressly vested a particular function in relation to the reservoir area in one rather than another of the interested Bureaus, some question might conceivably be raised as to the propriety of relieving it altogether of any connection with the discharge of such function. But it is obvious

<sup>56</sup> At page 685.

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that each one of the interested agencies may have some function to perform in relation to the reservoir area. On the other hand, the administration of the Columbia Basin project is vested in the Secretary, and it is the Secretary who is directed to set aside a part of the Columbia River Reservoir for the benefit of the Colville and Spokane Indians. The Secretary also has a general power of selection among the interested agencies by virtue of section 161 of the Revised Statutes (now 5 U. S. C. sec. 22), which provides that "The head of each department is authorized to prescribe regulations, not inconsistent with law, for the government of his department, the conduct of its officers and clerks, the distribution and performance of its business \* \* \*."

##### 5. THE QUESTION OF CONSTITUTIONALITY

The act makes the use of the reservoir by the Indians subject to "such reasonable regulations as the Secretary may prescribe for the protection and conservation of fish and wildlife." On April 6, 1940, while the legislation was under consideration, the Acting Commissioner of the Bureau of Fisheries addressed a memorandum to the Assistant Chief Counsel of the Bureau of Reclamation, which suggested that the proposed plan of Federal regulation might present a constitutional question. Strangely enough, it does not appear that this question was further explored prior to the passage of the act. However, in his memorandum of July 4, 1944, to the Solicitor, the Assistant Chief Counsel of the Bureau of Reclamation again raised the question of constitutionality, referring to the decision in *Silas Mason Co. v. Tax Commission*, 302 U. S. 186 (1937), which involved merely the question whether the State of Washington could levy an occupation tax on a private contractor on the Grand Coulee Dam, whose activities were carried on at Mason City on land ceded by the State of Washington to the Federal Government, as to which the Court held there had been no cession of exclusive jurisdiction. Moreover, there was in this case no act of Congress which expressly conferred a power of regulation upon an officer of the Federal Government.

Article IV, Section 3, of the Federal Constitution, confers upon Congress the power to "make all needful Rules and Regulations respecting the Territory or other Property belonging to the United States." The title to the shorelands is undoubtedly in the United States in fee simple absolute. While the United States has no property interest in the waters of the reservoir, and the title to the river bed is rather complicated,<sup>57</sup> the property interest of the United States

<sup>57</sup> As already indicated, the complexities arising from this state of the title could be avoided by locating the Indian areas of the reservoir within the exterior boundaries of the reservations.

would seem to be sufficiently broad to justify Federal regulation. While normally State conservation laws would govern even on Federal property, there is no doubt that Congress could override them if it had reasonable basis for supposing that such a step was necessary. See *Hunt v. United States*, 278 U. S. 96 (1928).

While the power to preserve fish and game is inherent in the sovereignty of a State, it is nevertheless subject to any valid exercise of authority under the Federal Constitution. *New York ex rel. Kennedy v. Becker*, 241 U. S. 556, 562 (1916). Among the powers of Congress is the control of the navigable waters of the United States. Although the authority of a State to regulate fishing in navigable waters of the United States within its territory was recognized at an early date, in *Manchester v. Massachusetts*, 139 U. S. 240 (1891), the Court declared that such regulation would be valid only "in the absence of any regulation by the United States." (P. 265.) The provision of the act of June 29, 1940, obviously constitutes such regulation. Congress, in carrying out its plan for the improvement of navigation on the Columbia River, could validly proceed upon the assumption that the control of hunting and fishing on the reservoir required Federal regulation in whole or in part, either because such a measure was desirable in itself, or because it was deemed a desirable factor in providing compensation to the Indians. It was once argued that the constitutional power of the United States over its waters was limited to control for navigation. But this narrow view was emphatically rejected in *United States v. Appalachian Electric Power Co.*, 311 U. S. 377, 423 *et seq.* (1940), in which the Court recognized that "the authority of the United States is the regulation of commerce on its waters," and also declared, "It is no objection to the terms and to the exertion of the power that 'its exercise is attended by the same incidents which attend the exercise of the police power of the states.'"

Finally, there is the plenary power of Congress over Indians and Indian affairs, which has been recognized by a long line of decisions since *United States v. Kagama*, 118 U. S. 375 (1886).<sup>58</sup> Indeed, in *United States v. McGowan*, 302 U. S. 535, 538 (1938), the Supreme Court declared: "Congress alone has the right to determine the manner in which this country's guardianship over the Indians shall be carried out."<sup>59</sup> While the Federal regulation of Indian hunting and fishing in the reservoir may extend to areas as to which the Indian title has

<sup>58</sup> See *Board of Comm'rs v. Seber*, 318 U. S. 705, 716 (1943), footnote 18, in which the earlier cases are collected.

<sup>59</sup> Compare the early declaration in *Lone Wolf v. Hitchcock*, 187 U. S. 553, 565 (1903): "Plenary authority over the tribal relations of the Indians has been exercised by Congress from the beginning, and the power has always been deemed a political one, not subject to be controlled by the judicial department of the government."



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been extinguished,<sup>60</sup> the plenary power of Congress over Indians does not necessarily depend upon title. *United States v. Thomas*, 151 U. S. 577 (1894). The power of Congress to regulate the liquor traffic with Indians on lands ceded by them has been uniformly upheld, despite the fact that the Indian title has been extinguished. While in *United States v. Forty-three Gallons of Whiskey*, 93 U. S. 188 (1876), and in *Dick v. United States*, 208 U. S. 340 (1908), the power to regulate such traffic was based upon the authority of Congress to regulate commerce with the Indian tribes, in *Perrin v. United States*, 232 U. S. 478, 482 (1914), the Court declared that the power was also derived "in part from the recognized relation of tribal Indians to the Federal Government." Similarly, the jurisdiction of the Federal courts under section 548 of Title 18, United States Code, to punish the so-called major crimes when committed by Indians on fee-patented lands has been upheld.<sup>61</sup> In *United States v. Ramsey*, 271 U. S. 467, 471 (1926), the Court declared in general terms that "Congress possesses the broad power of legislating for the protection of the Indians wherever they may be within the territory of the United States."

There is implicit in the doubts expressed concerning the constitutionality of the act the idea that the question ought to be avoided by conforming the regulations issued under the authority of the act to the provisions of State law. Upon the question whether such a course ought to be adopted on independent grounds of policy as the best practical measure, I need express no opinion. It is plain, however, that such a course need not be adopted because of the supposed desirability of avoiding constitutional doubts, which have no substantial basis. I see no reason to doubt the amplitude of the constitutional power of Congress in providing for Federal regulation of the Indian reservoir areas.

WARNER W. GARDNER,  
*Solicitor.*

<sup>60</sup> Even if it were assumed that the Indian titles to the shorelands and the river bed have both been extinguished, it would not necessarily follow that the effect was to redefine the reservation boundaries and thus to exclude the acquired lands. In *United States v. Celestine*, 215 U. S. 278 (1909), the Court declared in general terms that when land is fee patented it still remains within the limits of the reservation. If this is so, it is difficult to see why acquisition of title by the United States should *ipso facto* terminate the reservation, especially since the Indians still have a limited number of special rights in the areas in question. A reservation is not a grant and has nothing to do with title. *Alaska Pacific Fisheries v. United States*, 248 U. S. 78, 86 (1918).

<sup>61</sup> See *Eugene Sol Louie v. United States*, 274 Fed. 47 (C. C. A. 9th, 1921); *State v. Johnson*, 249 N. W. 284 (Wis., 1933). There are dicta pro and con in *United States v. Kiya*, 126 Fed. 879 (D. C. N. Dak., 1903); *Ex parte Tilden*, 218 Fed. 920 (D. C. Idaho, 1914); *State v. Big Sheep*, 248 Pac. 1067 (Mont., 1926); *State v. Columbia George*, 65 Pac. 604 (Ore., 1901); *United States v. Gardner*, 189 Fed. 690 (D. C. E. D. Wis., 1911); *People v. Pratt*, 80 P. (2d) 87 (D. C. A. Calif., 1938); *Quagon v. Biddle*, 5 F. (2d) 608 (C. C. A. 8th, 1925). The disagreement in the authorities is based upon the language of the statute rather than upon constitutional considerations.

**J. C. ALDRICH****A-24041***Decided January 4, 1946***Public Lands—Necessity for Departmental Determination.**

An applicant seeking to locate scrip upon certain land cannot be heard to complain that the Department erred in failing to determine whether the land was public land or not when the Department, for purposes of acting upon his application, assumed that the land was public land.

**Temporary Withdrawals—Appropriation—Act of June 25, 1910 (36 Stat. 847).**

Executive Order No. 6910 constitutes an appropriation of public land within the meaning of the Valentine Scrip Act, even though considered only as a temporary withdrawal for purposes of classification, and therefore bars the location of scrip. Congress has indicated that such a withdrawal under the act of June 25, 1910, is an appropriation.

**Valentine Scrip—Executive Order No. 6910.**

Regardless of whether or not it constitutes an appropriation, Executive Order No. 6910 clearly and definitely excludes the lands withdrawn from location by Valentine scrip. The mere right to locate scrip upon such land is not saved by the clause in the order that it is "subject to existing valid rights."

**Valentine Scrip—Classification of Land.**

Classification of land under section 7 of the Taylor Grazing Act as not suitable for Valentine scrip location is proper where the land is beach land used by the public as a recreational area and is located within the limits of an incorporated city.

**Taylor Grazing Act—Classification of Land—Authority of Secretary.**

The authority conferred by section 7 of the Taylor Grazing Act upon the Secretary to classify public land is discretionary, not mandatory, whether he undertakes classification upon his own initiative or upon application of an interested party.

**Mineral Waiver—Agricultural Surface Entry Act.**

It is unnecessary to decide whether Valentine scrip may be located upon mineral land upon the filing of a mineral waiver under the agricultural surface entry act of July 17, 1914 (38 Stat. 509), when other reasons exist for not classifying the land sought as suitable for scrip location.

**MOTION FOR REHEARING**

J. C. Aldrich has filed a motion for rehearing of the decision of the Assistant Commissioner of the General Land Office, approved by me on November 28, 1944, rejecting his application to locate Valentine scrip on certain land in the City of Seal Beach, California. Together with his application, which was filed on December 27, 1943, Aldrich filed a petition under section 7 of the Taylor Grazing Act, as amended (49 Stat. 1976; 43 U. S. C. sec. 315f), for classification of the land as proper for such scrip location. The application was re-

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jected on the ground that the land in question is not "unappropriated" public land, it having been withdrawn from settlement, location, sale, and entry by Executive Order No. 6910 of November 26, 1934. Under the Valentine Scrip Act of April 5, 1872 (17 Stat. 649), the scrip is locatable only on "unoccupied and *unappropriated* public lands of the United States, not mineral." [Italics supplied.] The petition for classification was denied for the reason that the land in question is in an area reported by the Geological Survey as valuable for oil and gas deposits, is within the limits of an incorporated city, and, being beach land, is used by the public as a recreational area.

Although the motion for rehearing specifies 14 grounds of error, they may be reduced to 4 basic contentions that the decision erred (1) in not deciding whether the land in question is public land; (2) in holding that the withdrawal and reservation of public lands by Executive Order No. 6910 constituted an appropriation of such lands which would bar them from location by Valentine scrip; (3) in holding that the land applied for is occupied and is mineral in character and that it is, therefore, unavailable for location by Valentine scrip; (4) in that it was based upon restrictions and conditions which the Secretary without authority added to the Valentine Scrip Act.

The City of Seal Beach, pursuant to leave granted, has filed a brief in opposition to the motion for rehearing.

## I

Aldrich first complains that the decision did not determine whether or not the land applied for constitutes public land. He argues that the Department has jurisdiction only over the public domain and that therefore until it decides that the land in question is in the public domain, its decision can be nothing but dicta. He then repeats the argument advanced in the brief filed by him in support of his application to the effect that the land in question is public land. The decision acknowledged the fact that there had as yet been no departmental determination that the land is public land; but it held that it was unnecessary to pass on the point since appellant's application could be adjudicated upon the basis of whether such land, assuming it to be public land, would be patentable under his application.

Aldrich has not shown that he has in any way been injured or prejudiced by the Department's failure to pass upon the question of title to the land in question. Indeed, in assuming the land to be public land and to come in that essential respect within the provisions of the Valentine Scrip Act, the Department took the most favorable view of his application. He cannot be heard to complain that he has been deprived of any rights or subjected to any detriment because the

Department has assumed in his favor one of the essential requirements of the act.

## II

Aldrich's second and principal contention is that the Department erred in holding that the land in question was "appropriated" by reason of its being included in Executive Order No. 6910 of November 26, 1934. That order provided as follows:

\* \* \* it is ordered that all of the vacant, unreserved and unappropriated public land in the States of Arizona, California, \* \* \* be, and it hereby is, temporarily withdrawn from settlement, location, sale or entry, and reserved for classification, and pending determination of the most useful purpose to which such land may be put in consideration of the provisions of said act of June 28, 1934, and for conservation and development of natural resources.

The withdrawal hereby effected is subject to existing valid rights.

This order shall continue in full force and effect unless and until revoked by the President or by act of Congress.

The order was issued pursuant to authority vested in the President by the act of June 25, 1910 (36 Stat. 847), as amended by the act of August 24, 1912 (37 Stat. 497; 43 U. S. C. secs. 141-143). Section 1 of that act provides:

That the President may, at any time in his discretion, temporarily withdraw from settlement, location, sale, or entry any of the public lands of the United States including the District of Alaska and reserve the same for water-power sites, irrigation, classification of lands, or other public purposes to be specified in the orders of withdrawals, and such withdrawals or reservations shall remain in force until revoked by him or by an Act of Congress.

Aldrich argues that a temporary withdrawal for purposes of classification does not constitute an appropriation of land, that an appropriation consists of the setting aside of land for a special use or purpose.<sup>1</sup> In support of this position, he cites *Wilcox v. Jackson*, 13 Pet. (38 U. S.) 498 (1839), quoting from that case the following language: "Now this is appropriation, for that is nothing more nor less than setting apart the thing for some particular use" (p. 512). He also cites *Lewis et al. v. Town of Seattle et al.*, Copp's Public Land Laws (1882), vol. II, p. 1018 (also reported in 1 L. D. 497 (1881)), in

<sup>1</sup> Throughout his argument on this point, Aldrich stresses the fact that the withdrawal of 1934 was stated to be "temporary" in character. This appears to be a reiteration of a contention made by him in the brief filed in support of his application that a "temporary" withdrawal cannot be an appropriation and that to so hold is to give a temporary withdrawal a permanency which is incompatible with the word "temporary" itself. In the decision under review, it was pointed out that section 1 of the 1910 act, quoted above, provides that temporary withdrawals shall remain in effect until revoked by the President or by act of Congress. Furthermore, it has consistently been held that it is immaterial that withdrawals under the 1910 act are not limited as to time and that they remain in effect until revoked. *Wilbur v. United States*, 46 F. (2d) 217, 219 (App. D. C., 1930), *aff'd* 283 U. S. 414 (1931); *Shaw v. Work*, 9 F. (2d) 1014 (App. D. C., 1925), *cert. denied* 270 U. S. 642; *United States v. McCutchen*, 234 Fed. 702, 712 (D. C. Calif., 1915); 54 I. D. 222, 225 (1933).

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which Secretary Kirkwood quoted the language from the *Wilcox* case and stated that it was an exact definition of the term "appropriation" as it is invariably used in public-land legislation. Aldrich then refers to *George G. Frandsen*, 50 L. D. 516 (1924), in which a broad statement is made to the effect that a temporary withdrawal pending classification of land does not dedicate it to any special purpose or reserve it for any special form of disposal. From this he concludes that the withdrawal of the land in question pursuant to Executive Order No. 6910 does not constitute an appropriation of the land so as to remove it from location under the Valentine Scrip Act.

In answer to appellant's argument, it may first be observed that the decision under review did not hold that a withdrawal *solely* for purposes of classification constitutes an appropriation. The decision stated (p. 2): "This Department has held that a withdrawal of land which reserved it for public purposes, *including* the classification of the land, constitutes an appropriation of the land \* \* \*." [Italics supplied.] Executive Order No. 6910 reserved the land withdrawn not only for purposes of classification, but also "for conservation and development of natural resources." This is a definite public purpose of which Aldrich has taken no notice.

If, however, the withdrawal order did reserve the lands withdrawn solely for purposes of classification, it would still constitute an appropriation for purposes of the Valentine Scrip Act. The cases cited by Aldrich do not require a contrary conclusion. While the language he has extracted from them superficially lends some support to his argument, not one of the cases, either expressly or impliedly, holds that a withdrawal of land for classification purposes does *not* constitute an appropriation of the land. In *Wilcox v. Jackson*, the question at issue was whether a settler was entitled to enter land which had been reserved by action of the President for military use and as an Indian agency trading post. The preemption act provided that no entry could be made on any land "which may have been appropriated for any purpose whatsoever." The court simply held that the reservation for military and Indian agency use constituted an appropriation within the meaning of the act. In *Lewis et al. v. Town of Seattle et al.*, it was sought to locate Porterfield scrip upon land claimed by a town under the town-site laws. Under the act of April 11, 1860 (12 Stat. 836), Porterfield scrip was locatable only upon public lands not otherwise appropriated. It was held that the land sought to be located was not appropriated, since the claim of the town thereto was without legal basis. As for the *Frandsen* case, the Department simply held there that a temporary withdrawal of land, pending its classification as to coal value, did not make it a "reservation" within

the meaning of section 6 of the Utah Enabling Act of July 16, 1894 (28 Stat. 107, 109). That section granted school sections to the new State but excluded therefrom lands in "Indian, military, or other reservations of any character" until such reservations were extinguished and the lands restored to the public domain. Thus, in none of the three cases was the court or this Department called upon to decide whether a withdrawal for purposes of classification constitutes an appropriation within the meaning of an act like the Valentine Scrip Act.

On the contrary, it has been held that the very Executive order in question constitutes an appropriation of land. In *Red Canyon Sheep Co. v. Ickes*, 98 F. (2d) 308 (App. D. C., 1938), one of the issues was whether a certain proposed exchange of private land for public land was authorized by the act of June 25, 1935 (49 Stat. 422; 16 U. S. C. sec. 486, note). That act extended the provisions of another act to exchanges made under still two other acts "which authorize the United States to acquire privately owned lands situated \* \* \* in the Lincoln National Forest in the State of New Mexico, by exchanging therefor an equal value of unreserved and *unappropriated* public lands within said State." [Italics supplied.] The appellants in the case contended that the exchange in question could not be made under this act because there was no "unreserved and unappropriated public land" left in New Mexico after the issuance of Executive Order No. 6910. The court stated that "this position of the appellants is not assailable" (p. 320), thus holding that the withdrawal order did amount to a reservation and *an appropriation* of land.

Moreover, Congress itself has clearly indicated that a withdrawal under the 1910 act for purposes of classification is an appropriation. In section 1 of the act, by authority of which Executive Order No. 6910 was issued, the President was authorized to withdraw from "location"<sup>2</sup> any public lands and reserve the same "for water-power sites, irrigation, *classification of lands*, or other public purposes to be specified in the orders of withdrawals." [Italics supplied.] In this enumeration of purposes, Congress drew no distinction between a withdrawal for classification and a withdrawal for water-power site, or for irrigation, or for other public purposes. Aldrich concedes that a withdrawal for the latter purposes would constitute an appropria-

<sup>2</sup> In *Heirs of Cliff L. Roots*, 42 L. D. 82 (1913), in ruling that the word "locate" as used in the act of March 3, 1909 (35 Stat. 844; 30 U. S. C. sec. 81), did not refer to settlement or homestead claims, the Department said: "It includes *scrip* locations and certain other rights not predicated upon settlement \* \* \*." [P. 84; italics supplied.] It is reasonable to construe the word "location" as used in the act of 1910 as having the same meaning.

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tion. Since a withdrawal for classification has been put by Congress on the same plane, it follows that it likewise is an appropriation.<sup>3</sup>

That Congress intended withdrawals under the 1910 act to have the effect of an appropriation and that Congress so interpreted the withdrawal order of 1934 with reference to the Valentine Scrip Act is established by section 7 of the Taylor Grazing Act, *supra*. As originally enacted (48 Stat. 1272), section 7 authorized the Secretary of the Interior to classify lands within grazing districts which were more valuable for agricultural production than for grazing and to open such lands to homestead entry. In 1936, after the issuance of Executive Order No. 6910, section 7 was amended to authorize the Secretary, in addition to classifying lands within grazing districts as suitable for homesteads, "to examine and classify any lands withdrawn or reserved by Executive order of November 26, 1934 (numbered 6910), and amendments thereto, \* \* \* which are \* \* \* proper for acquisition in satisfaction of any outstanding lieu, exchange or *script* rights or land grant, and to open such lands to entry, selection, or *location* for disposal in accordance with such classification under applicable public-land laws \* \* \*." (49 Stat. 1976; 43 U. S. C. sec. 315f; italics supplied.) This language clearly embraces scrip rights under the Valentine Scrip Act and unequivocally states that such rights may not be exercised with respect to lands withdrawn under Executive Order No. 6910 unless and until such lands are classified as being suitable for that purpose. It is obvious, then, that Congress construed the order as constituting an appropriation of lands for purposes of the Valentine Scrip Act.

<sup>3</sup> Section 2 of the 1910 act supports this construction. That section, as amended (37 Stat. 497; 43 U. S. C. sec. 142), provides in part that "there shall be excepted from the force and effect of any withdrawal made under the provisions of this Act all lands which are, on the date of such withdrawal, embraced in any lawful *homestead* or desert-land entry *theretofore* made \* \* \*." [Italics supplied.] The homestead law (Rev. Stat. sec. 2289, as amended, 43 U. S. C. sec. 161) provides that homestead entries may be made only on "unappropriated public lands." In expressly providing in the 1910 act that homestead entries made prior to a withdrawal should be excepted from the force of the withdrawal, Congress recognized that a withdrawal would have the effect of removing the lands withdrawn from their status as unappropriated land subject to homestead entry. And in excepting only prior entries, Congress clearly intended that a withdrawal should bar subsequent entries. It has been so held. *George F. Wunsch*, 43 L. D. 551 (1915) (land previously withdrawn under 1910 act as a right-of-way for a power transmission line excluded from homestead entry). This evidences the understanding of Congress that a withdrawal constitutes an appropriation of the land. See *Wood v. Beach*, 156 U. S. 548 (1895).

*Of. Kennedy v. United States*, 119 F. (2d) 564 (C. C. A. 9th, 1941); *Robert Fisk Lyman*, 56 I. D. 295, 299 (1938); *George J. Propp*, 56 I. D. 347 (1938); *United States v. John C. Brown*, 57 I. D. 169 (1940). These cases involved the stock-raising homestead act of December 29, 1916 (39 Stat. 862, as amended; 43 U. S. C. sec. 291), under which entries may be made only on "unappropriated, unreserved public lands." In these cases it was held that a stock-raising entry could not be made subsequent to November 26, 1934, on lands withdrawn by Executive Order No. 6910.

Aldrich attempts in turn to rely upon statutory language to show that the withdrawal and reservation under Order No. 6910 does not constitute an appropriation. Appellant's argument is not clearly stated but it appears to come to this: section 1 of the Taylor Grazing Act authorizes the Secretary by order to establish grazing districts from "vacant, unappropriated, and unreserved lands from any part of the public domain" (48 Stat. 1269, as amended, 49 Stat. 1976; 43 U. S. C. sec. 315). If Executive Order No. 6910, which withdrew "vacant, unreserved and unappropriated public land," has the effect of appropriating such land, it would follow that grazing districts could not be established from such withdrawn land, because such lands are no longer "unappropriated." But grazing districts are established from such lands; hence Order No. 6910 must not be an appropriation.

This argument is based upon a misconception of the holding in the decision under review. While that decision broadly stated that a withdrawal of land which reserves it for public purposes, including classification, constitutes an appropriation of the land, the decision held no more than that the withdrawal amounted to an appropriation within the meaning of the Valentine Scrip Act. It did not hold that the withdrawal was an appropriation for all purposes. From the time of the enactment of the Taylor Grazing Act, this Department has recognized that for the purposes of section 1 of that act the phrase "vacant, unappropriated, and unreserved lands" includes the public lands withdrawn by Executive Order No. 6910. Solicitor's opinion of February 8, 1935, 55 I. D. 205; Instructions of December 6, 1940, Assistant Secretary Chapman to Commissioner of the General Land Office (unreported); Solicitor's opinion of February 19, 1945, 59 I. D. 19. This has also been held by the Attorney General (38 Op. Atty. Gen. 350 (1935)). As indicated in these opinions, however, they were based upon the special nature of the circumstances attendant upon the enactment of section 1 of the act and the issuance of the withdrawal order.

Because lands withdrawn by that order have been held to be "vacant, unappropriated, and unreserved" for the purposes of section 1, it does not follow that they are to be considered as vacant, unappropriated, and unreserved for the purposes of all other acts. On the contrary, for the purpose of another section of the same Taylor Grazing Act, section 15 (43 U. S. C. sec. 315m), the Solicitor's opinion of February 8, 1935, *supra*, held that lands withdrawn by Order No. 6910 were "reserved" and therefore not subject to lease under that section as "vacant, unappropriated, and unreserved" lands. It was necessary to amend the order to permit the leasing of the withdrawn lands under section 15 (Executive Order No. 7235, November 26, 1935). The most that can be said for appellant's argument, therefore,



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is that Order No. 6910 did not change the status of the lands withdrawn so far as section 1 of the Taylor Grazing Act is concerned. That it did affect the status of the lands withdrawn so far as location of Valentine scrip is concerned admits of no doubt when the provisions of the 1910 act and section 7 of the Taylor Grazing Act are considered.

Aldrich advances another argument along the same line but upon a different premise. He cites *Wilcox v. Jackson, supra*, and *Hastings and Dakota Railroad Co. v. Whitney*, 132 U. S. 357 (1889), to the effect that whenever land is appropriated, it becomes severed from the mass of public lands and no subsequent law or proclamation will operate upon it. From this, he reasons that if Executive Order No. 6910 appropriated the lands withdrawn, section 1 of the Taylor Grazing Act could not operate upon such lands to authorize their inclusion in grazing districts; since the act does so operate upon these lands, it must follow that they are not appropriated. I have just stated that lands withdrawn and reserved by Order No. 6910 are not considered to be appropriated or reserved for the purposes of section 1. Assuming that they are considered to be appropriated, however, to meet Aldrich's argument, Congress has provided in section 1 that appropriated lands may be included in grazing districts. The first sentence of the section ends as follows: "*Provided, That no lands withdrawn or reserved for any other purpose shall be included in any such district except with the approval of the head of the department having jurisdiction thereof.*" [Italics supplied.] Lands withdrawn or reserved for specific purposes are, Aldrich agrees, appropriated. Congress has, therefore, provided that appropriated lands may be made subject to section 1, and there is nothing in the cases cited even to suggest that Congress lacks that authority.

It has so far been assumed that before Aldrich's application to locate scrip may be rejected, it must be found that the withdrawal of 1934 operated as an "appropriation" of the lands withdrawn. There is, however, no logical compulsion for this assumption. Executive Order No. 6910 was issued pursuant to an admittedly valid act. *United States v. Midwest Oil Company*, 236 U. S. 459 (1915). The order withdrew from "settlement, location, sale or entry" all vacant, unreserved, and unappropriated public lands in California and 11 other States. This included the only type of public land upon which Valentine scrip may be located, namely, unappropriated public land. Regardless of whether the order constituted an appropriation, it definitely and in specific terms excluded the withdrawn lands from location. This is sufficient reason in itself upon which to base a rejection of appellant's application.

As a final point, Aldrich refers to the provision in Order No. 6910 that the withdrawal effected by it "is subject to existing valid rights."

He contends that in Valentine scrip the holder has vested rights which are constitutionally protected and that these rights are saved by the clause quoted.<sup>4</sup> He apparently bases this contention upon a quotation from *West v. Lyders*, 36 F. (2d) 108 (App. D. C., 1929), set forth in the brief filed in support of his application. This quotation was to the effect that Valentine scrip gives the holder a vested right to the selection of unsettled or unappropriated public lands.<sup>5</sup> Granting this to be true, it does not mean that the right to select was saved by the withdrawal order. In the Solicitor's opinion of February 8, 1935, *supra*, the saving clause was construed. While it was stated that it was not practicable to give a precise and general definition of "existing valid rights," the phrase was held to include prior valid applications for entry, selection, or location *which were substantially complete* at the date of the withdrawal.<sup>6</sup> Obviously, this excludes a selection or location which was not even filed at the time of the withdrawal. In this situation, it has been squarely held that a Valentine scrip selection is invalid where the lands sought to be selected have been appropriated by a prior withdrawal. *Lyders v. Ickes*, 84 F. (2d) 232 (App. D. C., 1936); *Lyders v. Del Norte County*, 100 F. (2d) 876 (C. C. A. 9th, 1939). These cases dispose of Aldrich's assertion that in merely holding scrip which was not located he had vested rights which could not be defeated by the withdrawal.

From the foregoing discussion, it must be concluded that the withdrawal and reservation effected by Executive Order No. 6910 constituted an appropriation of the lands withdrawn within the meaning of the Valentine Scrip Act, or effectively withdrew the lands from location under that act, and that therefore Aldrich's application for location on the land in question was properly rejected.

<sup>4</sup>In advancing this argument, Aldrich necessarily admits that the withdrawal order would preclude the location of his scrip upon the lands withdrawn but for the saving clause.

<sup>5</sup>In contrast with the Court of Appeals' description of Valentine scrip in *West v. Lyders* is the characterization given the scrip by the U. S. Supreme Court in *Mann v. Tacoma Land Company*, 153 U. S. 273 (1894). Holding that plaintiff could not locate Valentine scrip upon tidelands, the Court said:

"\* \* \* [Valentine] had lost all legal right to this land, for when a commission had been provided for investigating the validity of such claims, he presented his claim for confirmation and then withdrew it. Congress had fulfilled all obligations to him growing out of the treaty with Mexico, and when by his own act he had forfeited his legal claims to the land, it was a mere act of grace by which was given to him the right to select an equal amount of land elsewhere. If Congress had thought that it was necessary in order to do justice that he should be permitted to select an equal quantity of land of like character, it was easy to have expressed that intention. Having failed to do so, and omitted any reference to tidelands, its donation to him is to be construed as any other grant of the government, and no unexpressed and suggested intention should be attributed to Congress \* \* \*." [Pp. 285-286.]

<sup>6</sup>See George J. Propp, *supra*, footnote 3. In discussing the Solicitor's opinion, the court in *Red Canyon Sheep Co. v. Ickes*, *supra*, indicated that perhaps it goes too far in including substantially completed applications for entry, selection, or location under the phrase "existing valid rights." If so, appellant's contention is further weakened.

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### III

Aldrich's third major contention is that the decision erred in holding that the land in question was occupied and is mineral in character and therefore unavailable for Valentine scrip application. In presenting his argument on this point, Aldrich reveals a complete misunderstanding of the holding of the decision. As he points out, Valentine scrip may be located on public lands which are unoccupied, unappropriated, *and* not mineral. If the land applied for is occupied *or* appropriated *or* mineral, the application must be rejected. Aldrich's application was rejected on the ground that the land was appropriated; it was not rejected on the ground that it was occupied *or* mineral in character.

Having been appropriated or withdrawn from scrip location by Executive Order No. 6910, the land was subject to location only if it were classified by the Secretary of the Interior under section 7 of the Taylor Grazing Act as being proper for acquisition in satisfaction of outstanding scrip rights. Aldrich sought such a classification by the petition filed by him together with his application. It was in acting upon this petition for classification, and not upon the application for location, that the Department considered the use to which the land was being put and its mineral character. In so doing the Department found that the area is being used by the public as a recreational area and is within the corporate limits of the City of Seal Beach. The Geological Survey reported that the land is valuable at the present time for oil and gas deposits. For these reasons it was decided that it was not in the public interest to classify the land as subject to Valentine scrip location. It was not decided, nor was it necessary to decide, that the land was occupied or mineral in the sense that would be necessary in order to justify rejection of the application for location if it were otherwise allowable under the Valentine Scrip Act.

It is unnecessary therefore to consider Aldrich's elaborate argument to the effect that the recreational use of the land by the public does not constitute an "occupancy" of the land in a legal sense. It may be pointed out, however, that the California cases cited by appellant in this connection all involved the question whether use by the public of certain land was sufficient to give a municipality title to or an easement in such land by adverse possession or prescription or was sufficient to support an inference that by acquiescence the owner of the land had dedicated it to public use. This is far afield from the issue involved here, and the cases are therefore not in point. The finding of public recreational use does not in any way impair what title the United States may have in the land.

All that need be noted is that Aldrich does not question the fact that the land he applied for is beach property and that it is being used by the public as a recreational area. Nor does he deny the fact that the land is within the corporate limits of the City of Seal Beach. With respect to the latter point, he merely reiterates his attack upon decisions of the Department which have consistently rejected applications to locate Valentine scrip within the limits of incorporated cities. *Valentine v. City of Chicago*, 6 Copp's Land Owner 22 (1879); *James H. May*, 3 L. D. 200 (1884); *Thomas B. Valentine et al.*, 5 L. D. 382 (1887). In so doing, he has completely ignored the express statement in the decision under review that the fact that the land is within the city limits of Seal Beach "has been considered only so far as it has a bearing on the *classification* of the land." [Italics supplied.]

Aldrich apparently would meet this point by arguing that classification of the land as suitable for location of his scrip is mandatory if the requirements of the Valentine Scrip Act are otherwise met. He makes this argument in connection with his contention that the land has not been appropriated by Executive Order No. 6910. Without deciding whether his application would be allowable under the Valentine Scrip Act, it is clear that under section 7 of the Taylor Grazing Act the power of the Secretary of the Interior to classify land is discretionary. Section 7 provides:

That the Secretary of the Interior is hereby authorized, *in his discretion*, to examine and classify any lands withdrawn or reserved by Executive order of November 26, 1934 (numbered 6910), and amendments thereto \* \* \* which are \* \* \* proper for acquisition in satisfaction of any outstanding lieu, exchange or script rights or land grant, and *to open such lands to entry, selection, or location* for disposal in accordance with such classification under applicable public-land laws \* \* \*. The applicant, after his entry, selection, or location is allowed, shall be entitled to the possession and use of such lands: *Provided*, That upon the application of any applicant qualified to make entry, selection, or location, under the public-land laws, \* \* \* the Secretary of the Interior *shall cause any tract to be classified*, and such application, if allowed by the Secretary of the Interior, shall entitle the applicant to a preference right to enter, select, or locate such lands *if opened to entry as herein provided*. [Italics supplied.]

Under this section provision is made for the Secretary to classify land in two instances, (1) when he decides to do so upon his own initiative, and (2) when application is made by a qualified applicant. In the latter case, it is mandatory for the Secretary to act; the word "shall" in the proviso makes that clear. Contrary to Aldrich's assertion, however, it is not mandatory that the classification which is required to be made must be made in accordance with the applicant's wishes. To so construe the proviso would be to defeat the entire purpose of the withdrawal and to add a needless formal step in the procedure for the disposal of public lands. Furthermore, such a con-

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struction would run counter to the concluding clause of the proviso which gives the applicant a preference right to enter, select, or locate land "*if opened to entry as herein provided.*" [Italics supplied.] There would be no necessity for this conditional clause if classification had to be in accordance with the application. Moreover, the "as herein provided" clearly relates back to the first provision for classification in section 7 which is expressly discretionary. Finally, the Department has consistently held that classification is a discretionary matter. *Florence Bell Wilson*, A. 23678, August 14, 1943; *William A. Burnett*, A. 21206, December 6, 1943; *Thomas W. Wright*, A. 23760, March 13, 1944 (all unreported).

It was therefore in the reasonable exercise of this discretion that it was decided that it was not in the public interest to permit appellant to locate his Valentine scrip upon a tract of beach land which was being used by the public for recreational purposes and which was within the limits of an incorporated city. That it is not in the public interest is further evidenced by the statement of the City of Seal Beach in its brief that it is "vigorously opposed" to the granting of Aldrich's application.

As for the mineral character of the land, which was an additional ground for classifying it as being not suitable for scrip location, Aldrich offers no new facts which would even tend to cast doubt upon the report of the Geological Survey. In fact, he merely repeats verbatim what he said on this point in the brief submitted with his application. Among the facts that he repeats is the admission that it is believed that a potential oil structure does exist a few thousand feet offshore. Aldrich attempts to dispel the effect of this admission, however, by quoting language from *United States v. Kostelak*, 207 Fed. 447 (D. C. Mont., 1913), to the effect that to ascribe mineral character to land, it is insufficient to demonstrate that adjacent lands are mineral in character. The *Kostelak* case is not the law. It expressly refused to follow the rule to the contrary which was laid down in *United States v. Diamond Coal & Coke Co.*, 191 Fed. 786 (C. C. A. 8th, 1911). That case was subsequently affirmed by the United States Supreme Court in *Diamond Coal and Coke Co. v. United States*, 233 U. S. 236 (1914), in which it was held that land could be determined to be mineral in character upon the basis of mineral showings on adjacent land. See, also, *United States v. Southern Pac. Co.*, 251 U. S. 1 (1919); *United States v. Standard Oil Co.*, 20 F. Supp. 427; 21 F. Supp. 645 (D. C. Calif., 1937), *aff'd* 107 F. (2d) 402 (C. C. A. 9th, 1939), *cert. denied* 309 U. S. 654. Aldrich's own admission therefore sustains the Department's determination that the land in question is valuable for oil and gas.

Aldrich, however, contends that the issue as to mineral character of the land has been eliminated from the case by reason of the waiver which he filed on November 2, 1944. In this waiver, he consented to amendment of his application so as to reserve to the United States all phosphate, nitrate, potash, oil, gas, or asphaltic mineral deposits in the land pursuant to the act of July 17, 1914 (38 Stat. 509; 30 U. S. C. secs. 121-123). That act provides that lands withdrawn or classified as containing these minerals or which are valuable for them may be appropriated, located, selected, entered, or purchased, if otherwise available, under the nonmineral land laws if the minerals are reserved to the United States. It is by no means clear that this act, which is entitled "An Act to provide for *agricultural* entry of lands withdrawn, classified, or reported as containing phosphate, nitrate, potash, oil, gas, or asphaltic minerals" [italics supplied], is applicable to a tract of sandy beach which Aldrich described in his petition for classification as "non-agricultural." Without going into this question, however, it is plain that this act has been modified by section 7 of the Taylor Grazing Act to the extent that lands which otherwise would be subject to acquisition pursuant to that act must now first be classified as suitable for such acquisition. Aldrich does not question this. Perhaps the waiver would eliminate mineral character as a consideration in classification, but, mineral character aside, the Department's determination that it would not be in the public interest to classify the land in question as suitable for Valentine scrip location is amply supportable on the other grounds previously stated. Contrary to Aldrich's fears, this does not mean, of course, that he cannot apply to locate his scrip upon land which is more suitable for such purpose.

#### IV

Aldrich's final contention is that the Secretary of the Interior has without authority and justification assumed to amend the Valentine Scrip Act by adding thereto restrictions and conditions which are not present in the act. Specifically, he complains that I have added these restrictions, (1) that an applicant to locate Valentine scrip cannot file within the limits of an incorporated city or town; (2) that he cannot file on property used by the public for recreational purposes; (3) that he cannot file on any property unless the Secretary classifies that particular property as open for filing under Valentine scrip; and (4) that he cannot file on any property which the Secretary decides is not in the public interest.

This contention has been answered in the preceding discussion and need not be further discussed. It is based upon Aldrich's funda-

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mental failure to distinguish between the rejection of his scrip application and the rejection of his petition for classification.

Aldrich's assignments of error having been found to be without substantial merit, the motion for rehearing is denied.

HAROLD L. ICKES,  
*Secretary.*

## DELEGATION OF AUTHORITY TO PERFORM CERTAIN FUNCTIONS RELATING TO ATTORNEY CONTRACTS WITH INDIAN TRIBES

### Delegation of Authority—Statutory Construction—Tribal Contracts— Attorneys—Determination of Counsel Fees.

Sections 2103-2106 of the Revised Statutes (25 U. S. C. secs. 81-84) provide, among other things, for dual action by the Secretary of the Interior and the Commissioner of Indian Affairs in connection with the approval of contracts between attorneys and Indian tribes and the approval of payments made thereunder. The express language of this legislation, as well as its legislative history, show that it was intended that these provisions be complied with literally, and for this reason the Secretary may not delegate to the Commissioner the functions mentioned which are committed to the Secretary. Similar functions, however, which are committed to the Secretary by section 16 of the act of June 18, 1934 (48 Stat. 984), are merely veto powers given the Secretary under legislation designed to enlarge the scope of tribal responsibility, and these powers may be delegated to the Commissioner or Assistant Commissioner by the Secretary if he so desires.

JANUARY 22, 1946.

### TO THE COMMISSIONER OF INDIAN AFFAIRS.

You have requested my views on the question of whether the Secretary may lawfully delegate to you or to the Assistant Commissioner the following functions: (1) The approval of attorney contracts with Indian tribes under sections 2103 to 2106 of the Revised Statutes (25 U. S. C. secs. 81-84), and section 16 of the act of June 18, 1934 (48 Stat. 984); and (2) the approval of payments, such as fees and expenses, under such contracts.

I am of the opinion that the functions of approving contracts and approving payments thereunder which are committed to the Secretary of the Interior by sections 2103 to 2106, *supra*, may not be delegated, but that the similar functions which are committed to the Secretary by section 16 of the 1934 act, *supra*, may be delegated.

Sections 2103 to 2106 deal with the making and assignment of contracts with Indian tribes relative to their lands or to claims, section 2103 laying down six specific requirements as to the form and the

manner of execution of such contracts. So far as pertinent here, those requirements are:

SEC. 2103. \* \* \* It [the contract] shall be executed before a judge of a court of record, and bear the approval of the Secretary of the Interior and the Commissioner of Indian Affairs indorsed upon it.

All contracts or agreements made in violation of this section shall be null and void, and all money or other thing of value paid to any person \* \* \* on account of such services, in excess of the amount approved by the Commissioner and Secretary for such services, may be recovered by suit in the name of the United States \* \* \*.

Section 2104 provides, in part:

\* \* \* no money or thing shall be paid to any person for services under such contract or agreement, until such person shall have first filed with the Commissioner of Indian Affairs a sworn statement, showing each particular act of service under the contract, giving date and fact in detail, and the Secretary of the Interior and Commissioner of Indian Affairs shall determine therefrom whether, in their judgment, such contract or agreement has been complied with or fulfilled; if so, the same may be paid, and, if not, it shall be paid in proportion to the services rendered under the contract.

Section 2106 prohibits the assignment of contracts coming within the scope of section 2103 unless "the consent of the Secretary of the Interior and the Commissioner of Indian Affairs to such assignment be also indorsed thereon."

This legislation was enacted to protect the Indians in their contractual dealings with attorneys and agents, a field in which the Indians were not without sad experience. The Indians had previously been the victims of monstrous and shameful frauds perpetrated by agents and attorneys, and this legislation which drastically curtailed the right to contract was obviously intended as an extreme measure designed to remedy what was regarded as a great evil. That Congress considered the matter one of major importance is well shown by this statement taken from the report of the House Committee on Indian Affairs:

This law \* \* \* if faithfully executed, will prevent in future this godless robbery of those defenseless people that has been so long permitted, to our great and lasting shame, and against their progress.<sup>1</sup>

It is against this historical background that these sections of the Revised Statutes have always been construed. As early as 1886, the Attorney General held that nothing less than literal compliance with the requirements of the act was essential, and that the Secretary was not empowered to dispense with any of those requirements.<sup>2</sup> Since that

<sup>1</sup> Investigation of Indian Frauds, H. Rept. No. 98, 42d Cong., 3d sess., March 3, 1873.

<sup>2</sup> 18 Op. Atty. Gen. 497, 498 (1886).



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time the courts have uniformly held unenforceable those contracts which failed in any particular to meet the requirements of the act.<sup>3</sup> As recently as 1935, the Solicitor held that a contract which extended by its terms for 5 years and so long thereafter as would be necessary to complete the litigation failed to meet the requirement of section 2103, that such a contract "shall have a fixed limited time to run, which shall be distinctly stated."<sup>4</sup>

In view of the history of the legislation and its unambiguous language, it is apparent that those provisions requiring dual action by the Secretary and the Commissioner must be literally followed. It is not the action of the Department that is required but the action of the two officials—the Secretary and the Commissioner. The idea that departmental sanction of a contract could supplant that required by the express terms of the statute was rejected by the Supreme Court in the following language in *Green v. Menominee Tribe*:<sup>5</sup>

\* \* \* But manifestly the right to deal did not confer power to deal by making unlawful contracts. And this consideration also answers the proposition so much insisted upon that because the asserted contract was made in the presence of and with the assent of an agent of the Interior Department, therefore the provisions of § 2103 should not be held applicable. We say the prior reasoning is controlling since it cannot be held that the presence of the agent of the Interior Department authorized the doing of that which was expressly prohibited by law. In other words, that an unlawful contract became lawful because of the presence, at its making, of a public officer whose obvious duty it was to see to it that the law was not violated. \* \* \*

The functions exercised by the Secretary under section 16 of the 1934 act, *supra*, rest on an entirely different footing. Indian tribes organized under that act may employ legal counsel, "the choice of counsel and fixing of fees to be subject to the approval of the Secretary of the Interior." The purpose of this provision, as heretofore recognized, was to give the tribes a greater degree of responsibility in their dealings with attorneys than they had enjoyed under sections 2103–2106 of the Revised Statutes, with the result that organized tribes may contract with attorneys subject only to the limitations imposed by section 16 of the 1934 act, *supra*.<sup>6</sup> The power conferred upon the Secretary by section 16 is merely a veto power over the choice of counsel and the fixing of fees, and I know of no reason why that power may not be delegated in accordance with the principles discussed in my memorandum of August 26, 1943.<sup>7</sup> I conclude, therefore, that the Secretary

<sup>3</sup> E. g., *Green v. Menominee Tribe*, 233 U. S. 558 (1914); *Pueblo of Santa Rosa v. Fall*, 273 U. S. 315 (1927); *McMurray v. Choctaw Nation*, 62 Ct. Cl. 458 (1926), *cert. denied* 275 U. S. 524 (1927).

<sup>4</sup> Op. Sol., I. D., M. 28033, June 4, 1935.

<sup>5</sup> 233 U. S. 558, at p. 570 (1914).

<sup>6</sup> Memo. Sol., I. D., January 23, 1937.

<sup>7</sup> 58 I. D. 499. [Editor.]

has legal authority, if he desires to use it, to delegate to the Commissioner or Assistant Commissioner the functions mentioned with respect to those tribes organized under section 16 of the 1934 act, *supra*. Any order prepared for the purpose of effecting such a delegation should contain a provision which gives interested parties the right to appeal to the Secretary from actions of the Commissioner or Assistant Commissioner.

WARNER W. GARDNER,  
*Solicitor.*

### UNITED STATES v. W. J. MOORHEAD

A-24172

*Decided February 25, 1946*

#### Mining Law—Sufficiency of Discovery—Findings of Commissioner and Register.

The concurrent findings of the register and the Commissioner that a sufficient discovery of minerals has been made on a claim will not be disturbed unless clearly wrong.

#### Mining Law—Application for Patent—Good Faith.

If a mining location is made in good faith for mining purposes and is supported by a sufficient discovery of mineral, an application for patent based thereon may not be rejected merely because the applicant may have been moved to make the application for the purpose of securing title to valuable timber on the claim.

#### Mining Law—Common Improvements—Contiguity of Claims.

Where a claim was located as being contiguous to a group of other claims and is shown by the official survey upon application for patent to be contiguous to such other claims, it will not be excluded from sharing in the benefit of common improvement work done for those claims merely because a mineral surveyor's map made in connection with another proceeding shows such claim to be noncontiguous.

#### Mining Law—Relocation of Mill Site—Common Improvements.

A mining claim which is located upon land previously located by the same claimant as a mill site is not entitled to share in common improvement work performed prior to location of the mining claim upon the theory that it is merely an amendment of and a continuation in substance of the earlier mill-site location.

#### Mining Law—Common Improvements—Privity of Interest.

A mining claimant who has made locations upon ground previously located by another is not entitled to claim the benefits of common improvement work performed for the benefit of the earlier claims upon his mere assertion that the claims were turned over to him by the earlier locator. Such an assertion is insufficient to establish a privity of interest between himself and the earlier locator.

*February 25, 1946***Mining Law—Common Improvements—Community of Interest.**

The existence of an understanding between two mining claimants that if either was to sell his claims the other would put in his claims too, and the fact that each would sometimes do assessment work for the other, are insufficient to show such a community of interest between the two in performing work on their claims that such work may be considered to be a common improvement for the benefit of both groups of claims.

**Mining Law—Common Improvements—Cabin.**

It is doubtful that a cabin for workmen may be considered a common improvement where no active mining operations have been conducted after erection of the cabin and there is nothing to show that it has been occupied by workmen working on the claims.

**Mining Law—Common Improvements—Apportionment.**

A shaft which is counted as a common improvement cannot also be considered to be an individual improvement for the benefit of the claim upon which it is located.

**Mining Law—Failure to Specify Claim in Charges.**

Although a claim is not specified in a contest proceeding brought against several claims in a group of which it is a part, the Department is not justified in issuing a patent for such claim in the absence of evidence showing that the statutory amount of improvements has been made on the claim.

**APPEAL FROM THE GENERAL LAND OFFICE**

December 26, 1940, W. J. Moorhead filed application for patent for a group of lode mining claims within the boundaries of the Whiteman National Forest, namely, the Eagle, Ophir, Coin, Coin No. 2, Sovereign, London, Ace, Goodyear, Mohican, Eclipse, Pathfinder, New York, Victor, and Foster. September 5, 1941, the Forest Service preferred charges against the application as follows:

1. That a valid discovery of mineral has not been made on any of these claims.
2. That \$500 worth of labor or improvements has not been expended or made upon or for the benefit of the New York, Coin No. 2, Foster, London, Goodyear, Ophir, Victor, Eclipse, and Ace claims.
3. That entry was not made in good faith for mining, but to obtain title to valuable timber.

Hearing was held between the parties upon the charges in June 1943, and upon consideration of the evidence the register found that the charges were not proven; that valid discoveries had been made on at least 12 of the claims; that the improvement and development work was sufficient; that the application was made in good faith for mining purposes and not for the purpose of obtaining title to the timber. He therefore recommended that the contest be dismissed.

By decision of March 29, 1945, the Commissioner of the General Land Office sustained the register's findings upon the issues of discovery and good faith, but held that the sum of \$500 had not been

expended for the benefit of the Coin No. 2, Ophir, Victor, Ace, and also the Pathfinder (not included in the charge), to meet the statutory requirement that "\$500 worth of labor has been expended or improvements made upon the claim by himself or grantors." (Sec. 2325, Rev. Stat.; 30 U. S. C. sec. 29.) Both parties have appealed.

On the first issue as to discovery, both the register and the Commissioner have set forth with particularity and fullness the evidence relating to mineralization, the results of sampling and assaying of rock on the various claims involved. Upon examination of the evidence, it does not appear that any pertinent evidence was not recited in the decision or not considered; consequently, the restatement thereof would serve no useful purpose. It suffices to say, after considering the criticisms of the findings by the protestant, that it is not perceived that in the decision assailed the Commissioner misjudged the weight or credibility of the testimony or arrived at a conclusion clearly wrong, or one as to which fair minds could not differ. The land is shown to be a part of a well-defined mineral belt. There is no serious question that the locations were not made in good faith for mining purposes; that gold and silver, and in some instances other metals, have been found in appreciable quantities, upon every claim involved, either in rock in place or in such a situation as reasonably leads to the inference that they came from rock in place on the claim upon which they were found. The question whether the quantity of mineral found would justify the expenditure of further time and money in the hope of opening a paying mine is a matter of opinion, and no sufficient reason is seen for disturbing the concurring findings of the register and Commissioner that a sufficient discovery of mineral has been made upon each and every claim involved. The concurrent decisions of the register and Commissioner should not be disturbed unless clearly wrong. *Coffin v. Inderstrod*t, 16 L. D. 382, 383 (1893); see, also, *United States v. State of California*, 55 I. D. 532, 542, 543 (1936). This rule has been applied to concurrent findings below upon the question of sufficient discovery upon mining claims situated in a national forest. *United States v. William A. Faris*, A. 23829, August 8, 1944 (unreported).

As to the third charge that the entry was not made in good faith for mining purposes, even if proved, it would not constitute a sufficient basis for rejecting the application. If a mineral application is based upon a location made in good faith for mining purposes and is supported by a sufficient discovery of mineral, the right of the owner thereof to a patent is not affected by the fact that he was moved to apply for a patent by the prospect of making an advantageous sale of the timber thereon. In the case of *United States v. Iron Silver Mining Company*, 128 U. S. 673 (1888), where it was alleged that

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the land was nonmineral and location thereof was changed from lode to placer to obtain title to valuable timber in pursuance of a fraudulent conspiracy, the Court said:

It may be, as contended, that Stevens was moved in his advice to Sawyer [to change the location from lode to placer] as much by the existence of the valuable growth of timber on the land as by the existence of gold in the ground, and that the timber could be advantageously used by the Iron Silver Mining Company. If such were the fact, it would not affect the applicant's claim to a patent. Probably in a majority of cases where a placer claim is located, other matters than the existence of valuable deposits of mineral enter into the estimate of its worth. Its accessibility to places where supplies and medical attendance can be obtained for the men engaged in working upon it, and timber secured to support the drifting or tunnelling which may be necessary; the facility with which water can be brought to wash the mineral from the earth, sand, or gravel with which it may be mingled; and the uses to which the land may be subjected when the claim is exhausted, may be proper subjects of consideration. A prudent miner acting wisely in taking up a claim, whether for a placer mine or for a lode or vein, would not overlook such circumstances, and they may in fact control his action in making the location. If the land contains gold or other valuable deposits in loose earth, sand or gravel which can be secured with profit, that fact will satisfy the demand of the government as to the character of the land as placer ground, whatever the incidental advantages it may offer to the applicant for a patent. \* \* \* [P. 684.]

Of course, where there is a question whether the land is valuable for mineral and it is shown to be valuable in other respects and for other uses than mining purposes, as where it contains valuable timber, evidence of such value is admissible as bearing on the claimant's good faith and the weight and credibility to be attached to the testimony. *E. M. Palmer*, 38 L. D. 294 (1909); see, also, *Stanislaus Electric Power Co.*, 41 L. D. 655 (1912); *United States v. Langmade and Mistler*, 52 L. D. 700 (1929); and *United States v. Anna W. Strumquist*, A. 17380, September 2, 1933 (unreported). However, a valid discovery has been made on the claims in question and a bona fide intent to locate the land for mining purposes satisfactorily appears.

In addition to the reasons assigned by the Commissioner evincing good faith on the part of Moorhead, it should be observed that such good faith is further evidenced by the fact that he did not content himself with the mere performance of perfunctory assessment work; that he caused a stamp mill to be hauled to the claim for milling the ore, and, though a man of limited financial resources, expended about \$2,000 in the installation of drilling equipment, mining tools, and other equipment necessary in mineral development. Furthermore, it seems no more than surmise that his object in seeking title to the land is motivated solely by the profit he expects to obtain from the sale of the timber on the claims. There is no good reason for impugning the good faith of Moorhead in making or acquiring the locations under the circumstances disclosed.

The question remains as to the correctness of the rulings of the Commissioner on the second charge. Exception has been taken by both parties in a number of particulars as to the methods of the Commissioner in crediting the value of the mining improvements among the claims, and as to the manner in which group development work was apportioned. Without specifically setting forth the numerous assignments of error, such of them as seem of sufficient importance to consider will be discussed hereinafter.

The material facts relating to location and ownership of the claims, as shown by the record, are as follows: The New York, Foster, London, Coin, Goodyear, Eagle, Sovereign, and Eclipse claims were located in the period from 1899 to 1902. H. C. Thomas and H. W. Foster were the locators of all of these claims, being joined by others as locators on one or another of the claims. More than 20 years later, in the period from 1923 to 1926, the Coin No. 2, Victor, Mohican, Ophir, Ace, and Pathfinder claims were located, the Coin No. 2 being located in 1926 by Thomas and the remainder in 1923 and 1925 by Moorhead. The Coin, Sovereign, Eclipse, and Coin No. 2 claims were quitclaimed by Thomas to Moorhead by deed dated June 28, 1937, Foster's interest in the first three having been forfeited to Thomas in 1925. The remaining five claims of the earlier group were quitclaimed to Moorhead by the heir of Thomas on January 15, 1941, and shortly thereafter the title of Moorhead in these claims was quieted as against the other original locators. Some contention is made that these claims were acquired by Moorhead prior to his acquisition of the Coin, Sovereign, Eclipse, and Coin No. 2, but this is not evidenced in the abstracts of title.

The official field notes of survey, certified and approved by the cadastral engineer, specify, in addition to improvements for individual claims, common improvements for the benefit of all the claims as follows: discovery shaft on the Coin lode valued at \$1,500, a shaft on the Sovereign valued at \$3,500, and a discovery shaft on the Pathfinder valued at \$3,150. The notes of survey further state that the value of the labor and improvements made on or for the benefit of each of the locations by the claimant or his grantors is not less than \$500. It appears from the uncontradicted testimony of Moorhead that the shaft on the Coin, 60 percent of the shaft on the Sovereign, and 75 percent of the shaft on the Pathfinder were completed before the six later locations above mentioned were made.

In apportioning these common improvements among the claims, the Commissioner held that the Foster claim should not participate because it was shown not to be contiguous to the other claims in the earlier group on a plat of survey purportedly made in 1903 by Deputy Mineral Surveyor Pearson, and was not made contiguous until the

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survey of 1940 (the official survey). He held also that as work on the shaft on the Coin was done before the six later locations were in existence, no part of the value of that improvement could be credited to those locations, but that it could be apportioned only among the seven earlier locations, the Foster being omitted.

The Commissioner further held:

Mr. Moorhead testified that he was on the Sovereign about 1923 or 1925 and that the shaft thereon was thereabout 60' or 70' deep. Allowing 60' as the depth in 1923, 60 percent of the expenditure of \$3,500 can be apportioned equally among seven of the eight claims located prior to 1923, the Foster being the one omitted, and 40 percent to thirteen claims, the Foster again being omitted.

The Pathfinder was located by Mr. Moorhead in 1923 and is a relocation of a prior claim. The shaft thereon was sunk by the owners of the prior claim, excepting about 25 percent of its depth which Mr. Moorhead testified was sunk by him. As there is no privity of interest between Mr. Moorhead and the owners of the prior claim, expenditures made by them cannot be credited to the Pathfinder (C. A. Sheldon *et al.*, 43 L. D. 153; section 409 Lindley on Mines, 3d edition). Therefore, only 25 percent of the expenditures of \$3,150 can be apportioned among the thirteen claims, the Foster again being omitted.

After apportioning the expenditures for the common improvements in the manner above set forth and after allowing the valuation set by the surveyor on the other improvements on the claims, it is found that the required \$500 have not been expended for the benefit of the Pathfinder, Coin No. 2, Ophir, Victor or Ace claims and consequently, the patent application is hereby held for rejection as to those claims. Although the charge of insufficient expenditures did not include the Pathfinder, notice is taken of the fact that the expenditures for the benefit of that claim are insufficient to meet the statutory requirement that \$500 be expended for its benefit as one of the prerequisites to the issuance of a patent. There was some testimony with respect to expenditures for a road and a boarding house but as those improvements were constructed prior to the locations of the five claims last named above, and as it is doubtful whether they can be considered common improvements, the expenditures for them cannot be apportioned among the five claims.

Moorhead contends that the Foster claim should be considered contiguous for the reason that the notice of location thereof states that the Foster claim adjoins the London claim on the western end and that there was error in staking the claim. He also refers to the testimony of the deputy mineral surveyor who made the official survey for patent. This testimony is to the effect that old maps in the possession of Moorhead, which guided him in the survey, showed the claims substantially in the position as represented in his survey, and that he believed the locations had been changed from time to time.

The Pearson map was made in 1903 in connection with a timber entry contest, and it is not believed that it should be taken as conclusive as to the location of the Foster claim during all or substantially all of the time in which the common improvement work on the Coin and Sovereign claims was being performed, a period running from around 1903 to at least 1937 when Moorhead acquired the Coin and Sovereign.

The location notice of the Foster clearly shows that it was located in 1900 as being contiguous to the London claim and it, of course, is now contiguous to the claims in question. There is no dispute that the common improvements on the Coin and Sovereign actually do redound to the benefit of the Foster claim, and it is not contended that such improvement work was not intended to be made for the benefit of the Foster. In view of these circumstances, the Department would not feel justified in concluding that the Foster claim was incontiguous and that it should not share in the common improvement work on the Coin and the Sovereign.

Another contention of Moorhead is that the Coin No. 2 lode should be considered as an amendment of the Coin No. 2 mill site inasmuch as it was located by Thomas, the owner of the mill site, and was not an adverse location, and that therefore the Coin No. 2 mining claim should share in the common improvements as one of the earlier group of claims. This contention is clearly untenable. Rights to a mill site are initiated by its use for mining and milling purposes, whereas rights to a mining claim are initiated by discovery of mineral. The change of location from one to the other necessarily involves a change not merely of form but of purpose. The mill site must be located on nonmineral land. By changing the location to a lode claim because it was ascertained that the land therein was mineralized, it was thereby admitted that the mill site was void from its inception, and no mining title can be held to relate back to the inception of a void location. Furthermore, the common improvement work on the mill site could only be applied to the group of mining claims that it tended to benefit. Mill sites are not subject to the annual labor laws and there can be no such thing as the development of a mill site. 2 Lindley on Mines (3d ed.) sec. 638.

There appears to be no doubt that the requisite amount of improvements was made upon the eight claims in the earlier group. While of these claims only the Coin had more than \$500 in individual improvements, there was sufficient in common improvements to raise the amount of improvements on each claim to \$500 or more. That the shafts on the Coin and Sovereign were a common improvement which benefits all of these claims is shown by the mineral surveyor's certificate. Such certificate is normally conclusive as to the sufficiency of the work performed and improvements made (*United States v. William A. Faris*, A. 23829, August 8, 1944, unreported), and no serious contention has been made that these shafts did not benefit all of the claims. The other requisites for common improvements are also present, namely, contiguity of the claims benefited by the improvements and common ownership of these claims. *Copper Glance Lode*, 29 L. D. 542, 549 (1900); 2 Lindley on Mines (3d ed.) sec. 630.



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It is not as clear as it could be that there was common ownership of the claims, but it appears to be true that during practically the entire period from the location of the earlier claims until 1923, in which period the shaft on the Coin and 60 percent of the shaft on the Sovereign presumably were constructed, Thomas and Foster held all or substantially all of the interest in all of the claims. Therefore, dividing \$3,600 among the eight claims (\$1,500 as the value of the Coin shaft and \$2,100 as the value of 60 percent of the Sovereign shaft) gives \$450 for each claim, an amount sufficient to meet the statutory requisite of \$500 when added to the individual improvements made on each claim (New York, \$220; Foster, \$100; London, \$50; Coin, \$2,700; Goodyear, \$100; Eagle, \$450; Sovereign, \$210; and Eclipse, \$100).

The real question arises in determining the amount of improvements which have been made upon the later claims. Of these, only the Mohican has sufficient in the way of individual improvements to meet the statutory requirement. It is necessary, therefore, to look to common improvements to make up the deficit. There are but two which may be considered, the discovery shaft on the Pathfinder valued at \$3,150 and the shaft on the Sovereign, already discussed in connection with the earlier group. As to the Pathfinder shaft, it is admitted that 75 percent of it had been completed when Moorhead filed his location on the claim in 1923, leaving only 25 percent of the shaft to be constructed by him. Moorhead contends, however, that he is entitled to the benefit of the earlier work as he would be were he the grantee of the claim. He bases this contention upon the assertion that Thomas, who had held locations upon the land, had turned them over to him because he, Thomas, being old and sick, could no longer handle them. Thomas, according to Moorhead, helped him to prepare his location notices and in some instances restaked the ground for him. Therefore, Moorhead concludes, he is not in the position of a relocater who concededly is not entitled to claim the benefit of improvements made by a prior locator (*Yankee Lode Claim*, 30 L. D. 289 (1900); *C. A. Sheldon et al.*, 43 L. D. 152 (1914); *Charles F. Guerin*, 54 L. D. 62 (1932)), but rather in the position of a grantee of a prior locator. It is not believed that Moorhead's assertions are sufficient to establish the necessary privity of interest between him and Thomas. Generally, perfected mining locations are considered to be real property in the highest sense of the word and their transfer is governed by rules applicable to other real estate. An agreement not in writing to convey an unpatented mining claim cannot be enforced. 2 Lindley on Mines (3d ed.) sec. 642; *South Dakota v. Madill et al.*, 53 I. D. 195, 200 (1930). The fact is that Moorhead actually made new locations upon the ground, and nothing appears to indicate

that he intended to base his possessory title to these claims upon any chain of title from Thomas. Nor does it appear that he purchased any improvements on the claims from the prior locators. Accordingly, it must be concluded that Moorhead cannot claim the benefit of the 75 percent of work done on the Pathfinder shaft prior to his location.

With respect to the 25 percent of the work performed by Moorhead (\$787.50) and the 40 percent of the work performed on the Sovereign shaft after 1923 (\$1,400), the Commissioner apportioned the value thereof among 13 of the 14 claims, leaving out the Foster as being noncontiguous. In making this apportionment of the value of the shafts as common improvements, the Commissioner necessarily assumed either that all of the claims were owned by Moorhead at the time the improvements were made or that there was a community of interest between Moorhead and Thomas and Foster in the performance of this improvement work. As to the first assumption, it has been pointed out that the record shows only that the Coin, Sovereign, Eclipse, and Coin No. 2 were quitclaimed to Moorhead in 1937 and that the remainder of the earlier claims was quitclaimed to him in 1941. Moorhead did testify that the 1937 deed was intended to convey to him all of the claims remaining to Thomas and Foster at the time, thus implying that he acquired the other claims before that time, but he was unable to recall when or how he got them (Tr. 140, 141). In the face of the written and recorded instruments, it cannot be assumed that Moorhead acquired possessory title to the claims at dates other than those specified in the deeds. Taking these dates, there is nothing to indicate that the later common improvement work on either the Pathfinder or Sovereign was performed or even partly performed after 1937 or 1941. It is much more probable that all or most of the work was done in the 14-year period between 1923 and 1937, especially in view of the fact that commencing July 1, 1932, the annual assessment work requirement under the mining laws was suspended by the Joint Resolution of June 6, 1932 (47 Stat. 290), and succeeding statutes until July 1, 1938. The abstracts of title contain notices filed by Thomas that he desired to hold the Coin, Sovereign, Eclipse, and Coin No. 2 under those suspension acts, and like notices filed by Moorhead for the Pathfinder group of six claims, both sets of notices covering the period from July 1, 1932, to July 1, 1937. At the same time a few scattered annual proofs of labor filed by Moorhead and Stover, his colocator on some of the later claims, show that some work was done on those claims prior to 1931. Thus it appears clear that all or most of the later common improvement work in question was performed at a time when the earlier and later groups of claims were in separate ownership.

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This fact alone, however, would not bar the apportionment of the common improvement work between the two groups of claims. Such work may still be considered as common to both groups if it can be shown that there was a community of interest between the separate owners in having the work performed. Thus different owners of adjoining claims may join in an agreement whereby a single shaft may be sunk or a tunnel driven on one claim for the joint benefit of the respective claims, even though not owned in common, and this will count as assessment work on all of the claims benefited as being part of a general plan or scheme of development. 2 Lindley on Mines (3d ed.) sec. 630. The testimony of Moorhead, however, is far from establishing such an agreement. He testified only that he had an understanding with Thomas that if either one was to sell his claims, the other would put in his claims too, neither holding enough ground alone to satisfy a company; he said also that sometimes he would do some work for Thomas and Thomas would do some for him (Tr. 140, 159). This is insufficient to indicate that Moorhead did work on the Pathfinder shaft under an agreement that it was to be also for the benefit of the earlier claims then owned by Thomas and Foster, or that the latter extended the Sovereign shaft with the understanding that it was to be partly for the benefit of Moorhead's claim.

It must be concluded, then, that because common ownership and community of interest were lacking, the respective improvements in question cannot be considered to be common improvements for the benefit of the entire group of claims. This also renders unnecessary any discussion of the rule in the case of *Aldebaran Mining Co.*, 36 L. D. 551 (1908), a special rule on the method of apportioning the value of extension work on a common improvement to claims located after the original improvement was made but prior to the commencement of the extension work. This special rule does not dispense with the necessity of community of interest in the common improvement; consequently, it is inapplicable in this case.

Taking the 40 percent of common improvement work done on the Sovereign claim after 1923 and assuming that all or most of the work was done after 1926 so that the Coin No. 2 is entitled to participate in it, this amount (\$1,400) apportioned among the eight earlier claims and the Coin No. 2 results in the amount of \$155.55 for each claim. This amount is important only to the Coin No. 2 since, as has been shown, the earlier claims have already met the statutory requisite of \$500. As for the 25 percent of common improvement work performed on the Pathfinder claim (\$787.50), it can be apportioned only among the Ophir, Ace, Mohican, and Pathfinder. The Coin No. 2 was not acquired by Moorhead until 1937, and the Victor, as shown by the official plat of survey made in 1940, is not contiguous to the

other claims, being only a cornering tract. 43 CFR 185.16; *Anvil Hydraulic & Drainage Co. v. Code*, 182 Fed. 205 (C. C. A. 9th, 1910); *Tomera Placer Claim*, 33 L. D. 560 (1905); *Hidden Treasure Consolidated Quartz Mine*, 35 L. D. 485 (1907); 2 Lindley on Mines (3d ed.) sec. 630. The Coin No. 2 is also not contiguous to these claims so that even if it were assumed that the Pathfinder improvement was not made until after 1937, and the contrary has been clearly indicated, the Coin No. 2 could not share in it. Apportioning the Pathfinder improvement, a value of \$196.87 is added to each of the four claims benefited, an amount insufficient together with the amount of individual improvements on three of the claims (Ophir, \$120; Ace, \$200; Pathfinder, none) to meet the \$500 requirement. The Mohican has, according to the official field notes of survey, over \$500 in individual improvements alone and therefore need not rely on common improvements to meet the requirement.

Moorhead contends that the value of a cabin erected on the Eclipse claim should be counted in the computation of group development work. He testified to the effect that it was erected about 4 or 5 years before the mineral survey was made (1940) as a place for him and his men to stay while engaged in contemplated mining and milling activities on the claim, and valued it at \$500. The mineral surveyor listed it in his report as an improvement but did not value it or credit it as an improvement available in meeting the statutory requirement. He testified at the hearing that the cabin was necessary for the working and operation of the claims, valued it at \$300, and explained its omission by saying he would have put in its value had the attorney for the claimant so directed. The mining engineer for the Government agreed that in working the claims the cabin was necessary, the claims being situated as they are with no other housing facilities available. Buildings, if they are erected for any purpose reasonably connected with mining operations, may be considered as improvements, and where the good faith of the applicant is unquestioned, the Department, in estimating the value of improvements, consisting of buildings erected for use in connection with *active* mining operations, will take a liberal view. 2 Lindley on Mines (3d ed.) sec. 631; *Douglas and Other Lodes*, 34 L. D. 556, 558 (1906); but see *William Dawson*, 40 L. D. 17 (1911).

It is doubtful, however, whether the cabin here should be counted as a common improvement. The evidence shows that no active mining operations have been undertaken since the cabin was built, and there is nothing to show that it has been used as living quarters for workmen engaged in working on the claims. But even assuming that it was of benefit to the claims, it does not appear that its value could be apportioned to the later claims located by Moorhead because they are

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not all contiguous, the Victor, as has been shown, being merely a cornering claim. This brings the case within the holding of the *Copper Glance Lode* case, *supra*. There it was held that a road and smelter, located outside of several noncontiguous claims but reported by the deputy mineral surveyor to be a common improvement, could not be apportioned among the claims because of their noncontiguity. In any event, even if the value of the cabin on the Eclipse were to be apportioned among the later group of claims, the amount apportioned to each claim, together with the amount of improvements otherwise attributable to the claim, would not be enough to make up for the deficiency of improvements on the claim. Of course, like the Pathfinder shaft, the cabin cannot be counted as a common improvement for the benefit of the earlier group of claims or the Coin No. 2, since there was no community or privity of interest present at the time it was constructed. *C. K. McCornick et al.*, 40 L. D. 498 (1912).

In an attempt to raise the value of improvements on the Pathfinder claim, Moorhead contends that the shaft on the Pathfinder, in addition to being a common improvement, incidentally demonstrated values in the Pathfinder, and declares that "the excess in value of this shaft over the amount required for common improvements upon the other claims in the group ought to be available to supply any deficiency in the Pathfinder." As has been shown, there is no excess value of this shaft over the amount required for the junior claims, and to count it as both an individual improvement and a common improvement would be to apportion it to the claims in unequal fractions, a procedure which has been expressly condemned. *James Carretto and Other Lode Claims*, 35 L. D. 361 (1907); *Mountain Chief No. 8*, etc., 36 L. D. 100 (1907).

Moorhead also complains that the Pathfinder was not specified in the charge as to deficiency in improvements and that he was unaware of any obligation to meet such a charge. He indicates that he might have shown sufficient improvements on the Pathfinder by alluding to testimony as to certain excavations which were made on the claim. However, he has presented no direct evidence that such individual improvements were made or that, either alone or in conjunction with common improvements, they were sufficient to meet the statutory requirement. The Department would not be justified in issuing a patent covering the Pathfinder unless satisfied that the requirement had been met.

From the record it does not appear that \$500 worth of labor or improvements was made upon the Coin No. 2, Victor, Ophir, Ace, or Pathfinder claims. This agrees with the Commissioner's conclusion as to those claims although the method of computation varies. Dif-

fering from the Commissioner, however, it is found that sufficient improvement work has been performed upon the Foster to entitle it to patent. The Commissioner did not expressly find the Foster to be lacking in improvements and did not hold the entry for cancellation as to that claim, but in excluding the claim from participation in common improvements and thus relegating it to reliance upon individual improvements which amounted to only \$100, he of necessity found the Foster to be lacking and, consistent with this finding, should have canceled the entry. In affirming the decision of the Commissioner, it is therefore understood that the entry as to the Foster claim is being allowed.

The decision of the Commissioner is affirmed.

WARNER W. GARDNER,  
*Acting Secretary.*

### WILLIAM A. MYATT

A-24267

*Decided March 14, 1946*

#### Mining Patents—Land Embraced in Outstanding Permit.

Where a mining location is made upon land embraced in an outstanding oil and gas permit, patents issued for the land are not for this reason subject to cancellation upon the ground of fraud over 6 years after issuance of the patents.

#### Sodium Permits—Lands Known to Contain Sodium Borates.

An application for a sodium permit must be rejected where the lands applied for are known to contain valuable deposits of sodium borates.

#### APPEAL FROM THE GENERAL LAND OFFICE

By decision of July 30, 1945, the Commissioner affirmed the action of the register in rejecting William A. Myatt's sodium prospecting permit application filed August 14, 1944, covering the SW $\frac{1}{4}$ SW $\frac{1}{4}$ NE $\frac{1}{4}$  and the S $\frac{1}{2}$  of sec. 24, T. 11 N., R. 8 W., S. B. M. The two tracts applied for comprise 320 acres of land in Kern County, California. The south half was patented March 5, 1933, to the Western Borax Company, of which applicant was an employee until July 1, 1933. These 320 acres were for a number of years actively mined for sodium borates. Application for a patent to the 10-acre tract in the northeast quarter was filed by the United States Borax Company, but as the result of a contest filed in 1937, it was held finally by the Secretary on July 31, 1944, that the mineral entry on this land, known as the Little Placer, was invalid (*United States v. United States Borax Co.*, 58 I. D. 426). The Commissioner's decision referred to the outstanding patents and mineral entry covering the land applied

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for and stated, as grounds for affirming the register's action, that the Department has no jurisdiction over patented land and no authority to receive other filings on land segregated by a mineral entry.

Myatt has appealed from this decision. He contends that the mining patents were unlawfully issued because the S $\frac{1}{2}$  of sec. 24 was embraced in an oil and gas prospecting permit when the mining locations upon which the patents were issued were made and that they should therefore be canceled for fraud. In support of this contention he quotes from the Department's decision in the *United States Borax Co.* case, *supra*, the portion in which it was concluded that the mining location on the Little Placer was void from its inception because it was made at a time when the Little Placer, as well as the S $\frac{1}{2}$  of sec. 24, was embraced in an uncanceled oil and gas prospecting permit. In a supplemental letter dated January 7, 1946, Myatt also encloses a copy of a letter from the Commissioner to him, dated February 23, 1937, in which the Commissioner states that any mining location for sodium made since passage of the Mineral Leasing Act (41 Stat. 437) would be void.

Appellant's attempt to regard the patents on the S $\frac{1}{2}$  of sec. 24 as open to the same ground of attack as the mineral entry and application for patent in the case of the Little Placer claim overlooks an important distinction in public-land law. Once a patent has been issued, certain defects in its issuance are necessarily cured. *United States v. Marshall Mining Co.*, 129 U. S. 579, 589 (1889); *Doe v. Waterloo Mining Co.*, 54 Fed. 935, 940 (1893). Legal title unquestionably passes from the United States by the patent. *United States v. Marshall Mining Co.*, *supra*, 587; *United States v. Schurz*, 102 U. S. 378, 402 (1880). If no suit to cancel is instituted by the Government within 6 years after granting the patent, a subsequently discovered fraud is the Government's only ground of attacking the patent. Act of March 3, 1891 (26 Stat. 1095, 1099; 43 U. S. C. sec. 1166); *United States v. Diamond Coal & Coke Co.*, 255 U. S. 323 (1921); *Exploration Co. v. United States*, 247 U. S. 435 (1918); *United States v. Christopher*, 71 F. (2d) 764, 765, rehearing denied 72 F. (2d) 375 (1934). In the Secretary's decision in the *United States Borax Co.* case, *supra*, no assertion was made that a mining location or a mineral entry is fraudulent simply because it was made at a time when the Land Office records showed the land in question to be subject to a mineral prospecting permit.

However, without further elaboration of the question raised by appellant's argument, it may be noted that the chain of title based on the 1933 patents to the S $\frac{1}{2}$  of sec. 24 has recently been recognized as valid by the United States in Civil Action No. 23690-G, brought for antitrust violations against Borax Consolidated, Ltd., and its affiliated

companies in the District Court for the Northern District of California, Southern Division.<sup>1</sup> This suit was terminated by a consent decree entered August 16, 1945, pursuant to which a receiver was appointed to sell the property known as the Western Mine and to remit the proceeds to the Borax Company or its affiliates, as their interests might appear. The consent of the Government to this decree was given by its duly qualified representatives. The same decree provided that the United States Borax Co. should quitclaim to the United States any interest it asserted to the Little Placer claim and dismiss a suit against the Secretary which it had filed in the United States District Court for the District of Columbia (Civil No. 25789), seeking to compel the Secretary to reverse his findings that the Little Placer claim was invalid. This suit was dismissed by the Little Placer claimant shortly after the decree in the antitrust suit, and the requisite quitclaim deed to the 10-acre Little Placer claim was duly filed for record on September 4, 1945, in Book 1221, p. 489, of the Kern County records. The mineral entry was canceled by the Commissioner on December 19, 1945.

Even though the mining location on the Little Placer was void from its inception, and even if it were assumed that the patents on the S $\frac{1}{2}$  of sec. 24 could be invalidated and the land restored to its former public-land status, appellant's application for a sodium *prospecting permit* would still have to be denied. As Myatt himself knows, the Western Mine on the S $\frac{1}{2}$  of sec. 24 was producing sodium borates long before he filed his permit application. The patents to the SE $\frac{1}{4}$  and SW $\frac{1}{4}$  were based upon discoveries of sodium borates. And in its decisions in the *United States Borax Co.* case, the Department held that the Little Placer claim was known, on August 11, 1926, to contain valuable deposits of sodium borates. Under section 24 of the Mineral Leasing Act (41 Stat. 437, 447, 45 Stat. 1019; 30 U. S. C. sec. 262), lands known to contain valuable deposits of sodium borates "shall be held subject to lease." 43 CFR 195.12. No prospecting permit may be issued for such lands. In his letter of January 7, 1946, Myatt says that he applied for a permit instead of a lease because the Department's decision in the *United States Borax Co.* case spoke of "applications for permits." The statement in the decision referred to is simply a footnote quoting from the Commissioner's decision canceling the *oil and gas* prospecting permit. In saying that "applications for permits" could be filed after the cancellation, the Commissioner was obviously referring to *oil and gas* permits. However this may be, section 24 is controlling upon the Department; it requires the leasing of the Little Placer claim and would require the

<sup>1</sup> *United States v. Borax Consol., Ltd., et al.*, 62 F. Supp. 220 (1945). [Editor.]



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leasing of the S $\frac{1}{2}$  of sec. 24 were it not patented. When the Department is ready to lease the Little Placer, appellant will be afforded the same opportunity as others to apply for a lease.

The decision of the Commissioner is affirmed.

WARNER W. GARDNER,  
*Acting Secretary.*

CARL T. OLSON

A-24226

*Decided March 25, 1946*

**Mineral Leasing Act—Mineral Lands—Coal Leases.**

Departmental rule (43 Code of Federal Regulations 193.3), precluding granting of coal leases absent a showing that an additional coal mine is needed and that there is an actual need for coal which cannot otherwise be reasonably met, reexamined and held appropriate in view of the economics of the coal industry and the position of the Government as a present and potential royalty holder.

**APPEAL FROM THE GENERAL LAND OFFICE**

The Commissioner of the General Land Office rejected the application of Carl T. Olson for a coal lease embracing the NW $\frac{1}{4}$  sec. 21, T. 154 N., R. 100 W., 5th P. M., North Dakota, on the ground that the issuance of the lease would jeopardize production from mines already opened in the vicinity.

In his appeal from the decision Olson pointed out that during the winter months many persons in the vicinity are unable to secure a supply of coal. He contends that in periods of severe weather this situation may involve local consumers of coal in a situation of substantial danger. Accompanying his appeal Olson submitted a petition signed by numerous residents in the vicinity of the lands involved which supports his position.

Because of the representations made by Olson, the Geological Survey conducted another examination into the situation. The report made as a result of this examination shows that any inability of the underground mine operators in the area to meet the demands of the local coal trade was temporary and due principally to labor shortage and to the fact that the coal users deferred the placing of their coal orders until cold weather, as had been their practice when labor was plentiful. Moreover, the production from the nine underground mines in the area is supplemented by a large supply of coal available from the strip mine on coal lease, Bismarck 024602, of Edward F. Lovejoy which, by utilizing a skeleton crew, is capable of supplying the local as well as outlying trade in nearby counties.

Olson also requests in his appeal "that this matter be considered as a question of government policy regarding the future development of the lignite coal industry in North Dakota, Montana and elsewhere in the United States," taking into consideration "possibilities in the use of lignite coal for the manufacture of nylon and many chemicals and other by-products which may revolutionize the future production of many essential articles."<sup>1</sup>

While this Department is not entrusted with the establishment or administration of general governmental policy relating to the lignite coal industry, it is apparent that applicant's request calls for reconsideration of the applicable rule of this Department respecting the lease of coal lands in situations of this type.

Lignite coal, by generally accepted definition, differs from standard bituminous coal principally in respect to friability and to moisture, B. T. U. and other factors revealed by proximate analysis. Substantially any use to which lignite coal may be put, however, is also able to be met by bituminous coal; and to the extent that lignite coal enters into markets which may be served by bituminous coals, it is subject to the same economic stresses as apply to bituminous coals. Periods of depression in the bituminous coal industry weigh heavily upon lignite coal producers. Despite minor structural and chemical differences in the composition of the two coals, the economies of the two industries are interwoven into a single fabric; each affects directly the course of the other. It is apparent, therefore, that the same considerations which are applicable to the lease of additional bituminous coal lands are also relevant to the lease of additional lignite coal lands.

The policy of the Department in this regard dates back to 1934—

The General Land Office will make favorable recommendation that leasing units be segregated and that auctions be authorized only in cases where there has been furnished a satisfactory showing that an additional coal mine is needed and that there is an actual need for coal which cannot otherwise be reasonably met. [43 CFR 193.3; *cf.* 54 I. D. 350 (1934).]

The reasons prompting the establishment of this policy were founded in the long economic history of the coal industry and the dread effect of that menacing history upon the public interest. The condition of the coal industry—

\* \* \* "for many years \* \* \* [had] been indeed deplorable." Due largely to the expansion under the stimulus of the Great War, "the bituminous mines of the country have a developed capacity exceeding 700,000,000 tons" to meet a demand "of less than 500,000,000 tons." In connection with this increase in surplus production, the consumption of coal in all the industries which are its largest users has shown a substantial relative decline. \* \* \* Coal has

<sup>1</sup> Applicant does not represent that the coal he proposes to produce would find its way into such byproduct markets.

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been losing markets to oil, natural gas and water power and has also been losing ground due to greater efficiency in the use of coal. The change has been more rapid during the last few years by reason of the developments of both oil and gas fields. \* \* \* [*Appalachian Coals, Inc. v. United States*, 288 U. S. 344, 361 (1933).]

\* \* \* Overproduction was at a point where free competition had been degraded into anarchy. Prices had been cut so low that profit had become impossible for all except the lucky handful. Wages came down along with prices and with profits. There were strikes, at times nation-wide in extent, at other times spreading over broad areas and many mines, with the accompaniment of violence and bloodshed and misery and bitter feeling. The sordid tale is unfolded in many a document and treatise. During the twenty-three years between 1913 and 1935, there were nineteen investigations or hearings by Congress or by specially created commissions with reference to conditions in the coal mines.

\* \* \* The plight of the industry was not merely a menace to owners and to mine workers: it was and had long been a menace to the public, deeply concerned in a steady and uniform supply of a fuel so vital to the national economy. [Cardozo, J., dissenting in *Carter v. Carter Coal Co.*, 298 U. S. 238, 330, 331 (1936).]

\* \* \* The investigations \* \* \* are replete with an exposition of the conditions which have beset that industry. Official and private records give eloquent testimony to the statement of Mr. Justice Cardozo in the *Carter* case (p. 330) that free competition had been "degraded into anarchy" in the bituminous coal industry. Overproduction and savage, competitive warfare wasted the industry. Labor and capital alike were the victims. Financial distress among operators and acute poverty among miners prevailed even during periods of general prosperity. This history of the bituminous coal industry is written in blood as well as in ink. [*Sunshine Anthracite Coal Co. v. Adkins*, 310 U. S. 381, 395 (1940).]

Nor is there a reason to believe that the condition of excess productive capacity has disappeared from the bituminous coal industry during the recent period of the war. It is true there were recurring periods of severe shortages of coal. These shortages, however, appear to have been attributable chiefly to a deterioration in the supply of available, experienced mine workers. At the present time there is no firm reason for believing that with the restoration of an adequate labor supply and the elimination of depleted domestic, industrial, and railroad reserves of coal, the industry will not again be confronted with a recurrence of the situations above described.

Were the departmental rule to rest alone upon the general public interest, it would be a reasonable and appropriate measure; but it finds firmer support. With respect to coal deposits upon the public domain, the Government assumes the capacity of a proprietor who desires the fruitful exploitation of the natural resources upon his lands.

Overproduction in the bituminous coal industry strikes at the prosperity of producers large and small, old and new. Overhead costs are slashed and then, as the effects of overproduction accumulate, impairment settles upon the ability of producers to meet fixed commitments. As a royalty owner the Government suffers. Finally, with

both capital and income exhausted, many producers give up the losing battle. In the light of conditions which exist in the industry, no market exists in which these producers can dispose of their mines and recover even a portion of their investments. Again the Government is the loser, for an abandoned mine frequently deteriorates beyond the point where it will be profitable within the foreseeable future to reopen it for the recovery of the merchantable coal left in the ground. Props give way, roofs collapse, water fills the entries and passageways, rails and equipment waste away in rust and corrosion. To the consumers of the Nation good coal once potentially available through operation of the mine is lost, and to the Government the royalties it might have brought are gone.

It is true, of course, that the position of the Department as the proprietor of coal deposits on the public lands is not a dominant one in the control of the industry. However sagacious the policy of the Department in the disposition of such coal deposits, it cannot through this method alone enable the industry to elude the press of natural economic forces. But this does not mean that the Department should knowingly contribute to an unfortunate situation. On the contrary, the course of wisdom would indicate that it should carefully refrain from accentuating a condition which may bring depression upon a great industry and those who depend upon it for their livelihood. This consideration, taken in conjunction with the position of the Department as a present and potential royalty owner, indicates that revision of the departmental rule at this time would be harmful to the lignite coal industry and not in the public interest.

The decision of the Commissioner is affirmed.

OSCAR L. CHAPMAN,  
*Assistant Secretary.*

#### J. S. PARSONS AND CLARA PARSONS

A-24227

*Decided April 23, 1946*

##### Taylor Grazing Act—Applications for Grazing Leases.

While it is the duty of the Secretary of the Interior to entertain conflicting applications for grazing leases and to dispose of them as equity and the public interest may require, the rules of the Department (43 CFR 160.21) contemplate that a substantial proportion of such controversies should be resolved by neighborly understanding among the competing stockmen.

##### Taylor Grazing Act—Grazing Leases.

Where a grazing lease provides that upon the termination thereof the lessee will be accorded a preference right to a new lease upon such terms and for such duration as may be fixed by the Department, upon the lessee's timely

*April 23, 1946*

assertion of a right to renewal, in the event the lands are then to be leased for grazing purposes, a new lease will be issued to such lessee for such duration and upon such terms as may then be appropriate in the circumstances.

#### APPEAL FROM THE GENERAL LAND OFFICE

This matter presents to the Department a controversy of a type which is becoming needlessly frequent. Neighbors each seek to lease the same public lands for grazing purposes under section 15 of the Taylor Grazing Act (48 Stat. 1269, 1275; 49 Stat. 1976, 1978; 43 U. S. C. sec. 315m). Unwilling to compose their differences among themselves they submit their claims to the competition of the administrative proceedings established to effectuate the act. Each vies in extolling his own worthiness and deprecating the needs and good faith of his neighbor. What is essentially a local matter between two or three stockmen is then submitted to the determination of the Secretary.

It is the duty of the Secretary of the Interior to entertain the matter and to dispose of it as equity and the public interests may require (48 Stat. 1269, 1270; 43 U. S. C. sec. 315a; 43 Code of Federal Regulations 160.20). The Secretary does not seek to escape or avoid this duty. But every case does not call for a single clear solution. Frequently, the Secretary is confronted with a situation where a number of possible divisions of the lands in conflict will meet the requirements of the public interest and, so far as can be conscientiously determined, do equity as among the contending neighbors. Such solutions, while correct under the governing statutory requirements, are not always in fact so satisfactory to the stockmen concerned as would be some other equally lawful and equitable solution effected by the stockmen themselves. While the Secretary will continue to settle these conflicts when they are presented to him, he cannot remain unaware that, as contemplated by the rules of the Department (43 CFR 160.21), a substantial proportion of these controversies could well be resolved by neighborly understanding among the competing stockmen as to the most satisfactory division of the desired grazing lands to be applied for by each of them. *Cf. Joe H. Hooker and Steve Villareal*, A. 24254, February 26, 1946 (unreported).

The instant matter presents an example of such a controversy. J. S. and Clara Parsons have filed a supplemental application under grazing lease 058527 and an application for renewal of their 3-year grazing lease 065346. Certain of the lands sought by the Parsons are also desired by the V. I. Sheep Company. Field examiners of the Department have examined these lands and have met with the contending parties in an effort to bring them into accord. Both

parties can well use the lands in conflict. Both control adjacent base lands. Neither, it appears, will make a concession.

In these circumstances, the Acting Assistant Commissioner of the General Land Office, having examined the reports of the field examiners, awarded to each of the parties the lands which appeared to be of the greater use in connection with his base lands. From this decision the Parsons have appealed, offering no facts which were not considered by the Acting Assistant Commissioner.

There is no doubt that all the lands in conflict would be useful to the Parsons in the management of their range. But they are also useful to the V. I. Sheep Company in the management of its range. In the exercise of good discretion the Acting Assistant Commissioner has endeavored to award to each of the parties an equitable proportion of the lands in conflict, taking into account the demands of satisfactory range management. Except for one item overlooked by the Acting Assistant Commissioner, as well as by the contending parties, no reason appears for disturbing the decision of the Acting Assistant Commissioner.

Among the lands embraced in the protest of the Parsons are the  $W\frac{1}{2}SW\frac{1}{4}$  and the  $NE\frac{1}{4}SW\frac{1}{4}$  sec. 23, and the  $SE\frac{1}{4}$  sec. 24, T. 40 N., R. 78 W., 6th P. M., Wyoming. These lands were embraced within the 3-year grazing lease 065346, for which the Parsons seek renewal. That lease contains the following provisions:

\* \* \* if at the end of said period [of three years] the Secretary of the Interior shall determine that a new lease should be granted, the Lessee herein will be accorded a preference right thereto upon such terms and for such duration as may be fixed by the Lessor.

In dealing with matters of this nature the Department has determined—

\* \* \* And where, as here, the lessee has timely asserted his right of renewal, his right cannot be said to have come to an end by the expiration of the old lease unless there is some other valid ground for a refusal to renew. It is, therefore, believed that the Department cannot ignore or withdraw the pledge of renewal of the lease. However, the renewal clause expressly provides that the lease may be renewed "upon such terms and for such duration as may be fixed by the Lessor." [*W. C. Condict*, A. 23366, June 24, 1942 (unreported); *Estate of D. M. Oberman*, A. 24176, March 25, 1946 (unreported).]

Accordingly, a lease will be issued to the Parsons for 2 years as of January 8, 1945, the expiration date of grazing lease 065346, embracing the  $NE\frac{1}{4}SW\frac{1}{4}$  sec. 23, and the  $SE\frac{1}{4}$  sec. 24, T. 40 N., R. 78 W., 6th P. M., Wyoming. No preference right of renewal is granted in the Department's leases and renewal leases now being executed and therefore none will now be granted in the lease to the Parsons. It is to be expected that prior to the expiration of

*April 25, 1946*

this new lease the Parsons and the V. I. Sheep Company will have arrived at some fair agreement which may be considered by the Department when the future disposition of these lands is again presented to it.

The decision of the Acting Assistant Commissioner is modified and as so modified is affirmed and the case remanded for further proceedings in accordance with this decision.

R. R. SAYERS,

*Acting Assistant Secretary.*

WILLIAM SHARPE, APPLICANT  
FRANK JUDD ET AL., PROTESTANTS

A-24182

*Decided April 25, 1946*

**Grazing and Grazing Lands—Use of Grazing Lands Prior to Taylor Grazing Act.**

The use of public lands for grazing purposes prior to the enactment of the Taylor Grazing Act did not vest the grazier with any right either in the grazing or in the lands upon which the grazing was conducted; at most, it was a privilege enjoyed by the public generally, revocable at the will of Congress, and terminated upon the enactment of the Taylor Grazing Act.

**Grazing and Grazing Lands—Wrongful Use of Grazing Lands.**

Wrongful use of grazing lands cannot be made the basis of any right to the further use of such lands.

**APPEAL FROM THE GENERAL LAND OFFICE**

In 1940, William Sharpe applied for a private exchange of lands under section 8 of the Taylor Grazing Act (48 Stat. 1272, 49 Stat. 1976; 43 U. S. C. sec. 315g). Both the base and selected lands are situated within Grazing District No. 3, Nevada. The application has been considered twice by the Assistant Secretary of the Interior (A. 23180, December 19, 1941, and June 13, 1942), and three times by the Assistant Commissioner of the General Land Office (July 12, 1941, July 3, 1942, and May 12, 1945). In his third decision the Assistant Commissioner both determined that the exchange would benefit the public interest and rejected the protest of Frank Judd and others to the consummation of the exchange. It is from the rejection of the protest that Judd has appealed.

In the original protest and upon this appeal Judd asserts that he is a bona fide farmer and an owner of land adjoining the lands selected by Sharpe; that he has been grazing his livestock upon the selected lands for more than 40 years; and that the decision to approve

the exchange neglects his "primary and so-called 'Grandfather Rights' " in the selected lands.

Judd's protest, filed in 1943, specifically assumes that he has a "right" of some nature by reason of his grazing use for the preceding 40 years. Of itself, such use did not vest in Judd any right either in the grazing or in the lands upon which the grazing was conducted. *Red Canyon Sheep Co. v. Ickes*, 98 F. (2d) 308, 314 (1938); *Omaechevarria v. Idaho*, 246 U. S. 343 (1918); *Willis J. Lloyd and Oscar Jones*, 58 I. D. 779 (1944). At most, it was a privilege enjoyed by the public generally, revocable at the will of Congress. *National Live-stock Company and Zack Cox*, A. 21222, July 7, 1938 (unreported). Any privilege Judd may have had to use the land for grazing purposes lapsed with the enactment of the Taylor Grazing Act of June 28, 1934 (48 Stat. 1269; 43 U. S. C. sec. 315-315n), which provided, among other matters, for the licensing of persons seeking to use the public lands for grazing purposes.<sup>1</sup> Moreover, the lands here selected were included within Grazing District No. 3 in 1936 and 1937, and became subject to the following rule:

The following rules shall supersede all previous rules heretofore promulgated for grazing districts created under the Act of June 28, 1934, as amended, and shall be operative in all grazing districts in the States of \* \* \* Nevada \* \* \*.

(a) **Acts prohibited.** The following acts are prohibited on the lands of the United States in the said grazing districts under the jurisdiction of the Division of Grazing:

(1) The grazing upon or driving across any public lands within the said grazing districts of any livestock without a license.

\* \* \* \* \*

(3) Allowing stock to drift and to graze on said district lands without a license. [43 CFR 501.21.]

The substance of these rules has continued in effect since they were initially established (43 CFR, Cum. Supp., 501.10).

Thus Judd had no primary and so-called "Grandfather Rights" to graze his cattle upon the selected lands. Moreover, it does not appear that Judd ever requested a license or permit to graze his cattle upon these lands after they were included within the grazing district. Consequently, his use of the lands during the past few years has been wrongful and certainly cannot now be made the basis of any right.

On the other hand, as found by the Assistant Commissioner, it appears that the consummation of the proposed exchange will facilitate the administration of Nevada Grazing District No. 3 by improving the land-ownership pattern therein and by permitting more proper land-use management. The exchange will benefit the public interests

<sup>1</sup> See, also, Executive Order No. 6910, November 26, 1934; Solicitor's opinion, 55 I. D. 205, 209 (1935).



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and nothing advanced by Judd in his original protest or on his appeal gives any persuasive indication to the contrary.

The decision of the Assistant Commissioner is affirmed.

R. R. SAYERS,  
*Acting Assistant Secretary.*

CHARLES S. HILL AND  
MOUNTAIN FUEL SUPPLY COMPANY

A-24171

*Decided April 26, 1946*

**Oil and Gas Lease on Lands Subject to Airport Lease.**

Since the Airport Lease Act of May 24, 1928 (45 Stat. 728; 49 U. S. C. secs. 211-214, as amended by the act of August 16, 1941, 55 Stat. 621; 49 U. S. C. sec. 211), grants only the right to the use of the surface for airport purposes, the Secretary may issue an oil and gas lease on lands covered by a previous airport lease. But the oil and gas lease must be so conditioned as not to impair the use of the surface for airport purposes under the airport lease.

**Oil and Gas Leases—Preference Right.**

Preference-right oil and gas leases under the act of July 29, 1942 (56 Stat. 726, as amended; 30 U. S. C. sec. 226b), are new leases and are subject to the discretion of the Secretary as to whether they should be issued at all. They may, therefore, be subject to stipulations not included in the previous oil and gas lease.

**APPEAL FROM THE GENERAL LAND OFFICE**

This is an appeal by Charles S. Hill from a decision of April 23, 1945, by the Commissioner of the General Land Office which rejected Hill's application (Evanston 022155) for a preference-right oil and gas lease<sup>1</sup> insofar as it covers sec. 30, T. 19 N., R. 103 W., 6th P. M., Wyoming.<sup>2</sup>

These lands had been included in Hill's 5-year exchange oil and gas lease (Evanston 08464), issued January 1, 1940. On May 29, 1941, this Department issued a 20-year public airport lease<sup>3</sup> (Evanston 020936) to the City of Rock Springs, Wyoming, covering sec. 30. The airport lease had been made expressly subject "to the right of the oil and gas lessee under exchange oil and gas lease Evanston 08464, issued as of January 1, 1940, to use such areas of the surface of said

<sup>1</sup> Under section 17 of the Mineral Leasing Act (41 Stat. 437, 443, as amended; 46 Stat. 1007; 46 Stat. 1523; 49 Stat. 676; 30 U. S. C. sec. 226) and the act of July 29, 1942 (56 Stat. 726, as amended; 30 U. S. C. sec. 226b).

<sup>2</sup> Although the appeal was filed after the expiration of the 30 days allowed under the Rules of Practice for filing an appeal (43 Code of Federal Regulations 221.75), this Department, in the beneficial exercise of its discretion, will waive that neglect in this instance.

<sup>3</sup> Under the act of May 24, 1928 (45 Stat. 728; 49 U. S. C. secs. 211-214).

premises as are necessary and adequate for the extraction and removal of oil and gas from said premises."

Shortly before Hill's lease (Evanston 08464) expired on December 31, 1944, he filed his present application (Evanston 022155) for the issuance of a "renewal lease" for the lands here involved "upon the same terms and conditions as the existing lease for a term of 5 years from January 1, 1945, and as long thereafter as oil or gas is produced in paying quantities." On the basis of this record, the Commissioner ruled that the right reserved in the airport lease (in favor of the oil and gas lessee) terminated at the same time as oil and gas lease Evanston 08464, and rejected Hill's application (Evanston 022155) for a new lease.

Hill's appeal (A. 24171), joined in by the oil and gas operator (Mountain Fuel Supply Company), requests that the new lease be issued "under the same terms and conditions as to the aforesaid section 30, T. 19 N., R. 103 W., as were provided in the agreements between Charles S. Hill and the City of Rock Springs dated June 3, 1941, and between Mountain Fuel Supply Company and the City of Rock Springs, dated April 6, 1942, providing for the recognition of the rights of the City of Rock Springs for use of the surface of the aforesaid section 30, T. 19 N., R. 103 W., as being paramount to the rights of the lessee and operator under oil and gas lease Evanston 08464."<sup>4</sup> Both Hill and the Mountain Fuel Supply Company agreed, in their appeal, "to execute any additional stipulations, agreements or amendments necessary to assure the City of Rock Springs the uninterrupted exercise of its surface rights under airport lease Evanston 020936."

Although Hill has a preference right to be awarded any oil and gas lease which may be issued, neither he nor the operator has a vested right to the issuance of a lease; the issuance of a preference-right oil and gas lease is subject to the discretion of the Secretary as to whether any lease should be issued at all. Accordingly, the Department requested the City of Rock Springs to express its views as to whether the issuance of the requested preference-right oil and gas lease would hamper the use of sec. 30 for airport purposes. By letter of April 5, 1946, the Mayor of the City of Rock Springs indicated that if the use of the land for airport purposes remained paramount to the use of the land for oil and gas purposes the City of Rock Springs would not object to the issuance of the oil and gas lease.

The act of May 24, 1928 (45 Stat. 728; 49 U. S. C. secs. 211-214), authorizes the Secretary to lease public lands "for use as a public airport." There is nothing in the act to indicate that the lease grants more than what it purports to grant, namely, a right to the use of the

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<sup>4</sup> The Department's files contain a copy of the agreement of June 3, 1941, but no copy of the agreement of April 6, 1942.

*April 26, 1946*

surface for airport purposes. There is nothing in the act or its legislative history to indicate that the issuance and existence of an airport lease on public lands would restrict the Secretary from leasing the minerals therein under the Mineral Leasing Act (30 U. S. C. sec. 181). The Mineral Leasing Act therefore can apply to such lands.

But, obviously, the issuance of an oil and gas lease cannot be permitted to impair the validity of a previous airport lease. As the Commissioner correctly ruled, Hill's lease (Evanston 08464) had expired and the right reserved in his favor in the airport lease had also expired. Any preference-right oil and gas lease he received would be a new lease, to which that reserved right would not apply. And it would not have been proper for the Commissioner to have issued a new lease to Hill, "upon the same terms and conditions" as his previous lease had enjoyed, so that the airport lease would be subjected to a condition not agreed to by the City of Rock Springs, and the value of the airport lease thereby possibly seriously impaired since the use of the surface for oil and gas production would be inconsistent with its use for airport purposes.

Hill and the Mountain Fuel Supply Company have, however, now agreed to execute any stipulations necessary to assure to the City of Rock Springs the use of sec. 30 for airport purposes. The agreement of June 3, 1941, between the city and Hill provided that the surface use of sec. 30 for airport purposes under the city's airport lease would be paramount to Hill's lease; that no oil drilling would be done in sec. 30; and that there would be no interference under the oil and gas lease with the use of sec. 30 for airport purposes.

In view of the appellants' agreement to subject any new oil and gas lease to the same conditions as are now provided in that agreement between Hill and the City of Rock Springs, the Department believes that the continued existence of the City of Rock Springs' airport lease does not require rejection of the application for a new oil and gas lease to Hill provided that the lease incorporate the following provision:

This lease, and any extension hereof or preference-right lease based hereon, shall be subject to the rights of the City of Rock Springs or its assignees or the United States to use sec. 30, T. 19 N., R. 103 W., for airport purposes; there shall be no drilling for oil or gas on sec. 30; and there shall be no interference in any way by the lessee or oil and gas operator hereof, or any agent, assignee, or successor thereof, which would hamper the use of said sec. 30 for airport purposes.

The decision of the Commissioner is modified, and the case is remanded for further action not inconsistent herewith.

R. R. SAYERS,  
*Acting Assistant Secretary.*

## JAMES H. MILLER

A-24256

*Decided May 2, 1946***Oil and Gas Lease—Submission of Bond.**

The successful bidder for an oil and gas lease is not to be relieved of the requirement to submit a \$5,000 corporate surety bond because of his contention that he does not now contemplate any drilling, for he was awarded the lease only upon that condition, and he expressly agreed to submit such a bond.

**Oil and Gas Lease—Compensatory Royalties—Submission of Bond.**

The successful bidder for an oil and gas lease is not to be relieved of the requirement to submit a corporate surety bond, for he could be required to drill so as to protect the land from drainage, or in lieu thereof to pay compensatory royalties (section 2 (c) of the lease; 43 CFR 192.28; section 17 of the amendatory Mineral Leasing Act of August 21, 1935, 49 Stat. 674, 678; 30 U. S. C. sec. 226), and in that case the bond would be necessary.

**Oil and Gas Lease—Submission of Bond—Possibility of Drainage.**

The successful bidder for an oil and gas lease should not be relieved of the requirement to submit a corporate surety bond because of his contention that there is no possibility of drainage, for it is impossible to predict accurately whether or not there will be drainage, and it is departmental policy not to offer lands for lease at public auction unless the lands are drained or threatened with drainage.

**APPEAL FROM THE GENERAL LAND OFFICE**

James H. Miller has appealed from a decision of the Commissioner of the General Land Office, dated September 21, 1945, which required him to furnish a \$5,000 corporate surety bond before a section 17 sale lease, Cheyenne 072086, is issued to him.

Leases to certain parcels of land within the known geologic structure of the Iron Creek Oil Field, Wyoming, were offered by the Department to the highest bidder. The invitation to submit bids specified that "a \$5,000 corporate surety bond must be furnished by the successful bidders prior to the issuance of the leases." Miller's sworn application for a lease specified that he is "ready \* \* \* to furnish such bond or bonds as may be required under the lease or regulations." And in his letter of May 22, 1945, submitting his bid, he made the following statement:

If awarded the lease I will agree to all provisions of your call for bids, such as—

\* \* \* \* \*

(c) Furnishing of \$5,000.00 corporate surety bond.

Miller's bid for parcel No. 1 of the land was accepted on June 19, 1945, and issuance of a lease in his name authorized. However, he

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failed to submit a \$5,000 bond and has requested to be relieved of that requirement. He argues that the amount of the bond would seem to be rather high in view of the fact that he does not contemplate any drilling on the land at this time; that according to his understanding of the regulations a \$5,000 bond is required only before drilling operations are begun, and that a \$1,000 bond should be sufficient until that time. Miller also contends that there is no possibility of drainage from the land, since one dry hole has already been drilled offsetting a part of the land to be leased, and two other dry holes were drilled high on the structure and located between this lease and the producing oil wells.

Submission of a \$5,000 corporate surety bond is required before issuance of the lease, and this requirement should not be waived. On May 12, 1939, the Under Secretary specifically instructed the Commissioner to require the successful bidder on a competitive lease to furnish a \$5,000 bond *prior to the issuance of the lease*. The lease was awarded to Miller only upon that condition and he expressly agreed to submit such a bond. He should not be relieved of that requirement because of his contention that he does not contemplate any drilling on the land at this time. If the lease were issued, Miller could be required to drill so as to protect the land from drainage, or in lieu thereof would be liable to pay compensatory royalties to the Government (section 2 (c) of the lease; 43 CFR 192.28; section 17 of the amendatory Mineral Leasing Act of August 21, 1935, 49 Stat. 674, 678; 30 U. S. C. sec. 226). And in that case, the \$5,000 bond would be necessary to assure the payment of such compensatory royalties as may accrue. Miller's argument that there is no possibility of drainage with respect to this lease is not convincing. It is impossible to predict accurately whether or not there will be drainage, and the possibility of such drainage therefore cannot, and should not, be disregarded. The policy of the Department is not to offer any oil or gas lands for lease at public auction unless such lands are actually being drained or are threatened with drainage of the oil and gas deposits. Consequently, it would be improper to deviate from the general requirement that a \$5,000 bond must be submitted before issuance of a section 17 competitive lease.

The decision of the Commissioner of the General Land Office was correct and is affirmed.

WARNER W. GARDNER,  
*Acting Secretary.*

## INVENTION OF SINGLE PRISM STEREOSCOPE

## Order No. 1763—Validity—Invention While on Leave—Relation of Invention to Duties—Development of Invention.

Departmental Order No. 1763 of November 17, 1942, is a valid exercise of the Secretary's right, under section 161 of the Revised Statutes, to prescribe regulations for the government of his department, the distribution and performance of its business, and the custody, use, and preservation of its property.

Order No. 1763 is applicable to an invention made on leave, whether annual or without pay.

The invention of an instrument used to obtain stereoscopic views of paired aerial photographs by an employee of the Interior Department (Geological Survey), whose position requires research and the supervision of research into processes and instruments for making maps, is within the general scope of his governmental duties, under Order No. 1763.

An invention made by an employee of the Interior Department within the general scope of his governmental duties is required to be assigned to the Government.

Reduction of an invention to practice by the construction of models on Government time, using Government materials, is such a substantial development of an invention on Government time, through the use of Government materials and financing, as to require its assignment to the Government under Order No. 1763.

M-34414

MAY 2, 1946.

## THE SECRETARY OF THE INTERIOR.

MY DEAR MR. SECRETARY: James L. Buckmaster, a mechanical engineer employed by the Geological Survey, has requested under protest my opinion concerning his rights and those of the Government in a Single Prism Stereoscope invented by him. In contending that he is entitled to full ownership of the invention, Mr. Buckmaster challenges the validity of Departmental Order No. 1763 of November 17, 1942, requiring the assignment to the Government of any invention made within the general scope of an employee's governmental duties, and asserts that the order in any event does not apply to his invention because most of the development work took place while he was on annual leave or on leave without pay. The Acting Director of the Geological Survey, in a memorandum dated February 20, 1946, transmitting the invention report, relies upon still another ground, lack of relation between the invention and Mr. Buckmaster's assigned duties, in support of his belief that the Government is not entitled to an assignment of the invention.

The case therefore requires the consideration of three distinct issues, (1) the validity of Order No. 1763; (2) the question whether the invention involved was made during a period of employment by the Department of the Interior; (3) the relevance of the invention

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to the inventor's work assignment. Consideration of these issues requires, in the first place, an analysis of the circumstances surrounding the development of the invention.

### 1. CIRCUMSTANCES SURROUNDING INVENTION

Mr. Buckmaster describes the Single Prism Stereoscope in the following language:

The stereoscope consists of a pair of binoculars adjustably mounted about 8 inches high, the right eye looking directly through a simple magnifier to one of the photos lying directly beneath, and the left eye looking into a prism so that the other photo of the stereoscopic pair appears to be superimposed on the first photo. The second photo is actually mounted in a holding frame just to the left, in a nearly vertical position. The instrument consists of a folding arrangement of photo holding frame, prism-lens binocular and support system. \* \* \* If no magnification is desired, the lenses are removed, the whole optical system then consisting of a single prism.

Mr. Buckmaster's earliest date of conception is stated to be about October 1942, but it was not until the summer of 1943, long after Departmental Order No. 1763 went into effect on November 17, 1942, that he had a complete mental picture of the device. No written description of the instrument was prepared, however, and it was not until the fall of 1943 that the invention was disclosed to others, to James G. Lewis, Alaskan Branch, and A. H. Frazier, Division of Field Equipment, both of the Geological Survey. The invention was first reduced to practice by the Division of Field Equipment's construction of a model about April 1945. Other models have since been constructed and used in various branches of the Survey. In addition, a model was furnished, apparently by Mr. Buckmaster himself, to the Aero Service Corporation of Philadelphia, Pennsylvania. The latter model was constructed at the inventor's expense, on his own time, while he was on annual leave from April 10, 1945, to June 7, 1945, and on leave without pay from June 7 to October 1, 1945.

During the period discussed above, Mr. Buckmaster worked for the Geological Survey in several capacities. The pertinent portions of his job descriptions, with the dates during which they were in effect, follow:

*August 10, 1942, to August 14, 1944.*

Under general supervision but with considerable latitude for independent action and decision, to pursue and direct researches required in the development of new methods and devices used in unique photogrammetric activities involved in the compilation of aerial photographs \* \* \*<sup>1</sup>

<sup>1</sup> It was decided in opinion of July 14, 1944, 58 I. D. 731, that assignment of inventions made pursuant to these duties was required without respect to Order No. 1763.

*August 14, 1944, to July 17, 1945.*

Under the general supervision of the Chief, Alaskan Branch Mapping Projects Division and as chief of the Map Evaluation and Research Section, performs the following duties involving the direction and supervision of a technical research subsection and a map research subsection \* \* \*:

\* \* \* To direct and advise an Engineer \* \* \* in the experimentation and the development of processes and instruments for specific mapping requirements.

To cooperate with and advise a Research Engineer \* \* \* in the analysis, evaluation and possible use of instruments and methods already developed or proposed by other agencies or by persons either within or outside of the Geological Survey.

*July 17, 1945, to date.*

Under the general administrative supervision of the Chief, Division of Field Equipment, performs the following:

1. Acts as chief of the Research Section, which designs, develops, evaluates, inspects, and tests special equipment used in topographic mapping \* \* \*.
2. Collaborates with any Geological Survey employee whose idea or suggestion regarding improvements in instruments and equipment has been approved for development by the proper authority, offers the benefits of his knowledge, experience, and facilities to the idea or suggestion submitted \* \* \*.

From December 15, 1943, to April 10, 1945, Mr. Buckmaster's time was primarily occupied with the Map and Control Evaluation Subsection, leaving little time for work with the Technical Research Subsection. His duties were concerned with the method of reconnaissance mapping known as the "Tri-Metrogon System." As pointed out by the Acting Director, the activities of the Tri-Metrogon Unit of the Survey were financed by the Army Air Forces, who desired the production of small-scale reconnaissance maps, chiefly of foreign areas.

## 2. CONTENTIONS THAT ASSIGNMENT IS NOT REQUIRED

(a) *The claim that Departmental Order No. 1763 is invalid.*—The portions of Departmental Order No. 1763 which require an assignment to the Government of inventions made after November 17, 1942, by employees within the general scope of their governmental duties, are as follows:

\* \* \* Each employee of this Department is \* \* \* required to assign to the United States, represented for this purpose by the Secretary of the Interior, all rights to any invention made by the employee within the general scope of his governmental duties. An invention will be considered within the general scope of the governmental duties of an employee (1) whenever his duties include research or investigation, or the supervision of research or investigation, and the invention arose in the course of such research or investigation and is relevant to the general field of an inquiry to which the employee was assigned, or (2) whenever the invention was in substantial degree made or



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developed: through the use of Government facilities or financing, or on Government time, or through the aid of Government information not available to the public.

Opinion of October 30, 1942, 58 I. D. 165, explained the legal basis for the order, which was then under consideration, pointing out that the Secretary was authorized by section 161 of the Revised Statutes (5 U. S. C. sec. 22) "to prescribe regulations, not inconsistent with law, for the government of his department, the conduct of its officers and clerks, the distribution and performance of its business, and the custody, use, and preservation of the records, papers, and property appertaining to it"; that the proposed order was such a regulation; that it was not inconsistent with law; that the provisions of the order making the assignment of certain inventions a condition of employment and part of the contract of employment are within the Department's rights as interpreted by decisions of the courts. Nothing has occurred in the more than 3 years since the opinion was approved by the Secretary to cause me to reach a different conclusion.

(b) *The claim that Order No. 1763 does not apply to the invention because most of the development took place while the inventor was on annual leave or leave without pay.*—For purposes of this discussion, it is assumed that the invention was within Mr. Buckmaster's regularly assigned duties, and that it was developed while he was on leave, points to be decided later in this opinion. Section 5 of Order No. 1763 provides, in part, as follows:

*This Order shall be a condition of employment of all employees of the Department of the Interior and shall be effective as to all inventions made during the period of such employment after this date. \* \* \* [Italics supplied.]*

An employee of the Federal Government does not cease to be an employee when he closes his desk at the end of a day or to go on leave. If the leave is annual or sick, he receives compensation, earned during his working time. If he is on leave without pay granted by his employing agency, he has the right to return to work when his leave terminates.<sup>2</sup> He retains his civil-service status, and can transfer to other agencies without a new appointment. He can be promoted or transferred to another job, as was Mr. Buckmaster during the period when he was on leave without pay, when he was transferred on July 17, 1945, from the Alaskan Division to the Division of Field Equipment. A portion of the time spent on leave without pay, up to 30 days, is credited toward automatic promotions under the Ramspeck Act (act of August 1, 1941, 55 Stat. 613). Persons on leave without pay are "employed in the executive branch of the

<sup>2</sup> There are certain exceptions to this statement, not relevant to this case.

Federal Government" insofar as the prohibitions and restrictions of the Hatch Act (act of August 2, 1939, 53 Stat. 1147) relating to political activities are concerned. In view of this accumulation of evidence that a person on leave, whether annual or without pay, is in the employ of the Federal Government, there is no doubt that Mr. Buckmaster's invention was made during his period of employment, within the meaning of Order No. 1763.

The courts have consistently held that an employee cannot circumvent a contractual obligation to assign to his employer an invention within the scope of his duties by developing it in off hours or while on leave. In *Toledo Machine & Tool Co. v. Byerlein*, 9 F. (2d) 279 (1925), the Sixth Circuit, a Circuit that is exceptionally strong on patent matters, held that an employee working for an annual or monthly salary under a contract "to devote his entire time and attention to his duties \* \* \* and to assign any ideas, patents, or patentable features \* \* \* pertaining to their line of product" to his employer was required to assign an invention developed at night. In *Mississippi Glass Co. v. Franzen*, 143 Fed. 501 (C. C. A. 3d, 1906), the court similarly required an employee who experimented in the Company laboratories at midnight to assign to it an invention resulting therefrom covered by his contract of employment. In *United States v. Houghton*, 20 F. (2d) 434 (1927), *aff'd Houghton v. United States*, 23 F. (2d) 386 (1928), *cert. denied* 277 U. S. 592 (1928), the court indicated that an employee of the United States Public Health Service who was directed by his supervisors to find a rodenticide with certain characteristics was required to assign the invention resulting from his investigations to the Government, even though it might have been developed on annual leave.<sup>3</sup>

Thus, Mr. Buckmaster was an employee of the Federal Government and of the Interior Department when he made his invention, and Order No. 1763 is applicable thereto.

(c) *The claim that the invention is not related to Mr. Buckmaster's assigned duties.*—It was held in opinion of July 14, 1944, 58 I. D. 731, that Mr. Buckmaster's duties under his job sheet in effect from August 10, 1942, to August 14, 1944, required research and investigation into the development of new methods and devices used in unique photogrammetric activities involved in the compilation of aerial photographs. From August 14, 1944, to July 17, 1945, Mr. Buckmaster was in charge of a technical research section responsible for the experimentation upon and development of processes and instru-

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<sup>3</sup> Two facts are worth noting in connection with this case, (1) certiorari was denied by the Supreme Court in 1928, only 4 years before its decision in the *Dubilier* case (289 U. S. 178); (2) the Public Health Service had no order corresponding to No. 1763 but relied entirely upon its common-law rights as an employer.

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ments for specific mapping requirements. Since the Single Prism Stereoscope was reduced to practice in April 1945, and the invention was therefore "made" by that time, it is unnecessary to consider the relation between Mr. Buckmaster's subsequent duties and the invention.

In both positions, Mr. Buckmaster was required to engage in or supervise research connected with mapping devices, limited in the first instance to aerial photography, even though he may have been able to spend little time on these activities. The Single Prism Stereoscope, in the words of the Acting Director of the Geological Survey, "permits easy and rapid attainment of stereoscopic views from any type of paired aerial photographs." The invention is, therefore, "relevant to the general field of an inquiry to which the employee was assigned."

Inasmuch as Mr. Buckmaster's duties contemplated the development of devices such as the present invention, and the instrument can be used in connection with Mr. Buckmaster's mapping work, it cannot be said that it did not arise in the course of his investigative and research duties. As emphasized above, a Federal employee does not cease to be one when he leaves his office for the day.

It is immaterial that, as pointed out by the Acting Director, the majority of Mr. Buckmaster's time during the inventive period was spent on office techniques rather than the development of field devices, of which this invention is primarily an example. The inventor's job descriptions do not differentiate between the two types of research, and the mere fact that certain work was more pressing during an emergency period does not relieve him from the responsibilities of his regular duties. Accordingly, the invention, which is directly related to Mr. Buckmaster's assigned duties of research and investigation, arose in the course of such research and is relevant to the general field of his assigned inquiries, is required to be assigned to the Government.

However, even if an assignment were not required by reason of the nature of Mr. Buckmaster's duties, Order No. 1763 would require an assignment because the reduction to practice by the Division of Field Equipment and the construction of several models for the Geological Survey was a substantial development of the invention on Government time, with the use of Government facilities. Mr. Buckmaster's subsequent construction of a model on his own time and at his own expense is not relevant to the question of title, which must be determined as of the time the invention was "made."

FELIX S. COHEN,  
*Acting Solicitor.*

## OTTO WILLIAM GEIST

A-24220

*Decided May 3, 1946***Homestead Entry—Residence Requirements—Second Entry.**

Failure of an entryman to meet the residence requirements of a homestead is not excusable, so as to entitle him to make a second entry, where such failure is due to the fact that his occupation as a paleontologist in a university prevented him from residing on his entry. Such failure to reside is excusable, however, where caused by the entryman's engaging in military defense work under the Army engineers in time of war.

**Homestead Entry—Second Entry.**

An entryman who is entitled to 2 years' credit on residence because of military service may be permitted to make a second entry, although he never resided on the homestead during the life of the first entry, if he was prevented from residing on the land during the fifth year of the original entry by reason of employment in military defense work.

**APPEAL FROM THE GENERAL LAND OFFICE**

On April 7, 1939, Otto William Geist made homestead entry, Fairbanks 04027, on lots 1, 2, 3, and 6, sec. 7, T. 1 S., R. 1 W., F. M., Alaska. He relinquished the entry on April 13, 1944, and filed an application to make a second homestead entry on the same land. By decision of June 5, 1945, the Commissioner, upon the basis of a field examiner's report, held that Geist was not entitled to the benefits of the second homestead entry act of September 5, 1914 (38 Stat. 712; 43 U. S. C. sec. 182), because he had not shown, as the act provides, that he had lost, forfeited or abandoned the entry "because of matters beyond his control." The decision also stated that the application was defective in that it was in conflict as to lots 2, 3, and 6 with the 80-rod and 160-rod shore-space restrictions (32 Stat. 1028; 48 U. S. C. sec. 371; 43 Code of Federal Regulations 77.1-77.7), and would be subject to rejection for that reason as to the last-described lots.

The field examiner reported that the applicant was employed at the University of Alaska during the following periods: In 1939, from July 1 into October; in 1940, from May 1 into December; in 1941, from May 15 to December 4; and in 1942, from May 15 to January 31, 1943. He further reported that Geist lived at the dormitory on the campus of the university and continued his work at the museum and in the field; that his field trips were seldom over a day long and that he almost invariably returned to the university by early evening; that his homestead cabin was about 1 mile from the buildings housing the university, about a 20-minute walk from the homestead; and that during periods when not employed by the university he worked at the American Museum in New York.

*May 3, 1946*

Gilbert Monroe has filed a protest against allowance of Geist's entry on the ground that the latter did not prove up on his claim, and that there is no reason to believe he will do so in the future.

It seems from Geist's statements and letters from others in support of his appeal that he is a paleontologist and was, when World War II broke out, engaged in searching for and collecting fossils for the University of Alaska and the American Museum. He attributes his failure to comply with the requirements of residence and cultivation on his former homestead to his professional field work in the summer and laboratory work in the winter which he says he could hardly abandon by reason of ethics, and to 18 months' service for the Army engineers in national defense work in building a road. He stated that he was solicited to go to work on the road because of the shortage of laborers, but that when the road was finished he was unable, despite attempts on his part, to obtain a release to fulfill his obligations on the homestead "during the last chance I had left to do so"; that while he was working for the Army engineers he was released to work for the Governor of Alaska at Nome because the work he had to do was semi-Army work to take care of the Nome A. T. G. Quartermaster and Ordnance supplies; that the engineers released him to Major Marston who wanted him for half a year; that he can at any time be released as his 6 months' work was finished over 7 months ago, but in the meantime, while awaiting the approval of his second entry, he has continued the work; that he could have quit the Army engineers at any time, but if he had done so he would have been "blackballed" and could not again get work in Alaska.

The applicant's letter is very vague and indefinite as to the periods in which he was employed by the Army engineers and as to the reasons why his previous work with the university would have prevented compliance with the homestead-law requirements. However, his application for second entry states that he started work for the Army engineers on February 15, 1943, and a letter dated July 27, 1945, from the Major of the Corps of Engineers in charge of the construction of the military highway, commending the applicant for his valuable services, states that his acquaintance with Mr. Geist began in the summer of 1943, and that he employed him in 1943 and 1944. The letter also confirms the statement of Geist that he sought to be released from the work but was refused, and that he was released to the Alaskan Territorial Guard in July 1944.

The homestead law requires residence upon the entry for a term of 3 years and cultivation during the second and third years and until final proof is made; 5 years from the date of entry are allowed for making final proof (Rev. Stat. sec. 2291, as amended; 43 U. S. C. sec. 164). Appellant therefore had until April 7, 1944, to show compli-

ance with the law. The fact is clear, however, that up to February 15, 1943, when he went to work with the Army engineers and when only slightly more than a year remained for meeting the homestead requirements, Geist had not resided upon his entry or cultivated it. It also appears clear that his failure to do so was not because of matters beyond his control. He did not commence work at the university until after he had made his homestead entry, and it does not appear impossible that he could have resided on his entry during the periods of his university employment. If his work was incompatible with his proving up on his homestead, nothing shows that he could not have reasonably foreseen this at the time he accepted his university position. If in the free exercise of choice he elected to undertake work which would prevent his complying with the homestead requirements, it cannot be said that the loss of his entry because of such noncompliance was due to matters beyond his control and that he is, therefore, entitled to make a second entry. Unless there are factors which would relieve Geist of the 3 years' residence requirement, then the rejection of his application must be affirmed.

Such factors are presented in a letter to the Department dated April 2, 1946, from Delegate E. L. Bartlett. This letter reveals that appellant served in World War I, and sets forth the following outline of his service as "furnished \* \* \* by the War Department from their official records:"

Otto S. W. Geist, ASN 900060, enlisted in Enlisted Reserve Corps and reported on June 1, 1917, at Kansas City, Missouri; reported for active duty September 4, 1917; honorably discharged October 12, 1919, at Camp Pontanezen, France, to reenlist; served as sergeant in Motor Truck Company 548, Motor Supply Train 428; reenlisted October 13, 1919, at Brest, France; honorably discharged October 12, 1920 at Camp Grant, Illinois; sergeant, Second Company, Quartermaster Corps, part of organization of Camp Meigs, Washington, D. C.; served as sergeant throughout war.

Under section 2305, Revised Statutes, as amended (42 Stat. 491; 43 U. S. C. sec. 272), and the act of February 25, 1919, as amended (42 Stat. 1067; 43 U. S. C. sec. 272a), a homestead settler is entitled to deduct from the residence requirements the period of his service in the Army, Navy, or Marine Corps during World War I, but he is not entitled to a patent unless he has resided upon, improved, and cultivated his homestead for at least a year after he commenced his improvements. Under regulations of the Department, a soldier with 19 months or more of military service is required to reside on the land at least 7 months during the first entry year (43 CFR 181.2), and for the purpose of computing periods of service World War I is considered as having commenced on April 6, 1917, and ended March 3, 1921 (43 CFR 181.5). It appears that appellant had more than 3

May 8, 1946

years of active service and was, therefore, required to reside on his entry for only 1 year (7 months if he availed himself of a full leave of absence under section 2291, Revised Statutes, as amended; 43 U. S. C. sec. 231).

At the time appellant went to work for the Army engineers, he could still have met the residence requirement since over a year remained of the life of his entry. The question then is whether his failure to do so was due to matters beyond his control as distinguished from his previous failure to meet the residence requirements. The Department takes the view that it was. Work required by military necessity and essential to national defense in time of war seems clearly to fall in a category different from an ordinary peacetime pursuit. In the circumstances disclosed here, with appellant practically required to engage in such work and at places away from his entry, the Department considers that he was prevented from meeting his residence requirements because of factors beyond his control and that he is entitled to a second entry under the act of September 5, 1914, *supra*. That act, being remedial in character, should be liberally construed and applied. *Ruth Morrow*, 47 L. D. 344 (1920).

As for the conflict between appellant's application and the 80-rod and 160-rod shore-space restrictions (act of May 14, 1898, as amended; 32 Stat. 1028; 48 U. S. C. sec. 371), the Department's policy on shore-space reserves has been revised since the Commissioner's decision. In accordance with this policy, approved February 26, 1946, claims in conflict with the 80-rod reservation will be allowed if a field investigation shows such allowance to be desirable. *Burt Ruoff*, A. 24068, decided March 8, 1946 (unreported).

In light of the new facts disclosed on the appeal, the decision of the Commissioner is reversed and the case remanded for disposition in accordance with this decision. Monroe's protest is denied.

OSCAR L. CHAPMAN,  
*Under Secretary.*

## INVENTION OF DEVICE FOR PLOTING MATHEMATICAL CURVES

### Order No. 1763—Governmental Duties of Employee—Government's Right to Use Invention Under Act of June 25, 1910, as Amended.

The invention of a Device for Plotting Mathematical Curves is not a part of the work of an electrical engineer whose duties consist of making lay-out and arrangement drawings of electrical equipment from data supplied by others, and is not relevant to the general field of his assigned inquiries.

An invention made on his own time without the use of Government materials, financing, or information not available to the public, and not in the course

of assigned duties of research or investigation, by an electrical engineer employed by the Interior Department, is not required to be assigned to the Government under Departmental Order No. 1763 of November 17, 1942.

Whether or not an inventor employed by the Interior Department, who makes an invention while so employed, files a patent application under the act of March 3, 1883, as amended (35 U. S. C. sec. 45), the Government is immune from suit for the use of the invention and is prohibited from paying him royalties for its use under the act of June 25, 1910 (36 Stat. 851), as amended by the act of July 1, 1918 (40 Stat. 705; 35 U. S. C. sec. 68).

M-34477

MAY 8, 1946.

THE SECRETARY OF THE INTERIOR.

MY DEAR MR. SECRETARY: My opinion has been requested concerning the relative rights of the Government and the inventor in a Device for Plotting Mathematical Curves invented by Samuel Fingerman, Jr., an electrical engineer employed by the Bureau of Reclamation at Denver, Colorado.

As an electrical engineer in the Electrical Design Section, Electrical Engineering Division, of the Branch of Design and Construction, Mr. Fingerman is assigned the duty of making lay-out and arrangement drawings of the station electrical equipment from field data, requirements and related information supplied by others. Improvements or changes in lay-outs are made when recommended by supervisors, or when the need for such improvements or changes is indicated by past experience. Without determining whether Mr. Fingerman's duties involve research or investigation, it may be stated that the invention is not so related to his assigned duties as to require its assignment to the Government under Departmental Order No. 1763 of November 17, 1942.

A Device for Plotting Mathematical Curves is a tool of Mr. Fingerman's profession, just as a slide rule, or an instrument of measurement, might be. Its usefulness is not unique to electrical engineers, but extends to any person whose work includes the plotting of mathematical curves. Its invention was no more a part of his work than the invention of a new pencil is the work of an attorney. Accordingly, even though the perception of the utility of the device may have arisen contemporaneously with the performance of Mr. Fingerman's duties, it cannot be said that the invention arose in the course of assigned duties of research, or that it was relevant to the general field of an assigned inquiry. (Opinion of January 18, 1945, 59 I. D. 12.)

The device was conceived and developed in Mr. Fingerman's home, at his own expense, without the aid of information not available to the public. Since it did not arise in the course of assigned duties of research or investigation, and was not developed through the use of



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Government facilities or financing, or on Government time, or through the aid of Government information not available to the public, it was not made within the general scope of the inventor's governmental duties, as defined in Order No. 1763 of November 17, 1942, and is not required to be assigned to the Government.

Since Mr. Fingerman does not desire to have his patent application prosecuted under the act of March 3, 1883, as amended (35 U. S. C. sec. 45), it is unnecessary to determine whether the invention is liable to be used in the public interest. It should be pointed out to Mr. Fingerman, however, that whether or not he proceeds under that act, the Government may use his invention without accountability for royalties, pursuant to the act of June 25, 1910 (36 Stat. 851), as amended by the act of July 1, 1918 (40 Stat. 705; 35 U. S. C. sec. 68). For details, see opinion M-34392 of February 26, 1946.

FELIX S. COHEN,  
*Acting Solicitor.*

#### PAYMENT OF EXPENSES INCURRED THROUGH THE DEATH OF A GOVERNMENT OFFICER OR EMPLOYEE PERFORMING OFFICIAL DUTIES IN A TERRITORY OF THE UNITED STATES

**Costs of Preparing the Remains of a Deceased Government Officer or Employee Include Costs of Exhumation—Performance of Official Duties in a Territory of the United States Does Not Depend on the Place Where the Officer or Employee Was Hired—Alaska Road Commission.**

Under the act of July 8, 1940 (54 Stat. 743; 5 U. S. C. sec. 103a), the head of an executive department may pay not only the costs of transporting the remains of a deceased Government officer or employee but also those of "preparing the remains" for transportation.

Under the act of July 8, 1940, *supra*, the costs of "preparing the remains" of a deceased officer or employee of the Government include the costs of exhumation. A contrary conclusion would defeat the purpose of the statute.

The act of July 8, 1940, *supra*, as well as Executive Order No. 8557 of September 30, 1940 (5 F. R. 3888), applies even though a Federal officer or employee was hired or rehired in a Territory or possession of the United States, since the act presupposes merely "performing official duties in a Territory or possession of the United States."

The language of Executive Order No. 8557, *supra*, "while on assignment to a post outside the United States" is identical in meaning with the statutory language: "while performing official duties in a Territory or possession of the United States."

Considering the purpose of the act of July 8, 1940, *supra*, it must be assumed that the President, by issuing Executive Order No. 8557, did not intend to limit the scope of that statute.

M-34460

MAY 9, 1946.

TO THE DIRECTOR, DIVISION OF TERRITORIES AND ISLAND POSSESSIONS.

Reference is made to Mr. Silverman's memorandum dated March 22, concerning Gerald Kemp, an employee of The Alaska Railroad, who died in Alaska and was buried in Fairbanks on February 9, 1945. In his submission, Mr. Silverman states that at the time of Mr. Kemp's death the United States Commissioner at Fairbanks notified his family and asked their advice as to funeral arrangements; that certain information as to cost of burial was transmitted to the family at its request but no further word was received and the employee was buried; that it now appears the family wishes to have the remains shipped to his home, presumably in Alabama but possibly somewhere else in the United States. Mr. Silverman also informs me that Kemp was originally hired in Seattle but that later he entered into a new contract in Alaska to avoid being dismissed under reduction-in-force procedure. On the basis of these facts, an opinion is requested on the following questions:

1. Does The Alaska Railroad have authority to pay expenses of exhumation incurred in connection with the return of the remains of one of its employees to his home in the United States?

2. If the expense of exhumation is not a permissible expense, could an arrangement be made whereby the family would undertake payment for exhumation, and the Railroad assume actual cost of transportation?

3. Does the fact that the deceased employee was hired in Alaska to work in Alaska, although his home is in the United States, preclude application of the benefits of the act of July 8, 1940, to his case?

It is my opinion that the first question should be answered in the affirmative.

The act of July 8, 1940 (54 Stat. 743; 5 U. S. C. sec. 103a), provides that, "in case any civilian officer or employee of the United States dies \* \* \* while performing official duties in a Territory \* \* \* of the United States," the head of the executive department concerned is authorized to pay the expenses of "preparing" and transporting to his home the remains of such officer or employee. The legislative history of the act<sup>1</sup> does not throw any light on the meaning of the

<sup>1</sup> The act of July 8, 1940 (54 Stat. 743; 5 U. S. C. sec. 103a), was introduced as Senate bill, S. 3899. On the legislative history of this bill see 86 Cong. Rec., parts 5-9, pp. 5296 (bill referred to Senate Committee on Expenditures in the Executive Departments), 6025 (bill reported back), 7009 (bill passed in Senate), 7251 (bill referred to House Committee on Expenditures in the Executive Departments), 8907 (bill reported back), 9129-9130 (bill passed in House), 9248, 9249 (bill examined and signed), 9308 (bill presented to President), and 9310 (bill approved by President). See, also, S. Rept. 1604 by the Committee on Expenditures in the Executive Departments, which reads as follows:

"The provisions of S. 3899 were prepared by the Bureau of the Budget after lengthy study and are in accord with the program of the President.

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term "preparing." Section 6 of Executive Order No. 8557 of September 30, 1940 (5 F. R. 3888), which constitutes the regulations issued by the President, defines "Preparation of Remains" as follows:

The costs of preparation of remains allowable under section 5 of these regulations shall include all the ordinary costs of embalming, cremation, necessary clothing, and a casket or container suitable for shipment to the place of interment. There shall also be allowed any expenses necessarily incurred in complying with local laws and laws at the port of entry in the United States relative to the preparation of dead bodies for transportation and burial.

In including embalming, cremation, necessary clothing, and a suitable casket or container, this definition does not exclude further measures related to the preparation of remains, even though they are not specified in the regulation. While precise authority on the point is lacking, a reasonable interpretation of the term "preparing" the remains clearly suggests that it includes the costs of exhumation. In many instances in which an officer or employee of the Government performs official duties abroad, many weeks, if not months, may pass until the next of kin of the deceased can be reached and until they can decide whether the remains of the deceased shall be returned to the United States and if so, where the interment shall take place. In these instances, the only measure which may and which, under local statutory or regulatory health provisions of some States, must be taken

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"The purpose of this bill is to authorize the United States to pay certain expenses in cases of death of civilian officers and employees of the Government while they are in a travel status away from their official stations in the United States, or in other words who are 'on the road,' or while they are performing their duties in foreign countries, or in Territories or possessions of the United States, or while they are traveling to or from such places. In such cases the head of the department, independent establishment, etc., concerned is authorized by section 1, under regulations to be prescribed by the President, to pay from the appropriations available for the activity in which the officer or employee is engaged (a) the expenses of preparing and transporting his remains to his home or official station or to any other place as determined by the head of his department, and (b) the traveling expenses of his dependents, including expenses of packing, draying, and transporting household effects and other personal property, in returning to his former home or to any other place as determined by the head of his department.

"It should be noted, however, that section 1 does not authorize the payment of burial expenses, nor does it authorize the payment of the traveling expenses of dependents in returning home in cases where the death of an officer or employee occurs while he is in a travel status in this country.

"The absence of the authority which would be provided by this section frequently results in great hardship to members of the families of low-salaried officers and employees who die while performing official duties in foreign countries, or in Territories or possessions of the United States, or away from their permanent stations in the United States. There have been many pathetic instances where families have been left stranded in foreign countries, and where they have otherwise been put to heavy expense. It seems that the Government is morally obligated to bear the expenses of returning to their homes the remains, families, and effects of such officers and employees. Section 1 of the proposed bill would eliminate such unfortunate situations.

"Section 2 provides that the expenses authorized to be paid by the bill may be paid even though the deceased was temporarily absent from duty at the time of his death.

"Section 3 provides that the bill is to become effective 60 days after the date of its enactment."

in the meantime is that of burying or cremating the deceased. Such a disposition is a temporary measure and is in no sense a permanent burial or interment. Consequently, it is my opinion that the term "preparing" the remains of the deceased includes the exhumation which in cases of this sort is nothing more than the final step necessary in preserving the body prior to transporting it.

This conclusion is fortified by the legislative history of the act of July 8, 1940, *supra*. The purpose of this act has been described in S. Rept. 1604, 76th Cong., 3d sess. (1940), as well as in H. Rept. 2688, 76th Cong., 3d sess. (1940), as follows:

It is scarcely necessary to elaborate upon the extreme hardship that is imposed under existing law upon the families of Federal employees stationed abroad who die while serving their country in a foreign land. Many of these men are in the relatively lower pay brackets and dependent entirely upon their salary. The drain upon the slender resources of their families in bringing back to the United States the remains of their dead husband or father and the family and its household effects is at best a very heavy one. At worst, it may mean that their only recourse is the charity of their relatives or friends. The situation is bad enough in times of peace. It is much worse in the present chaotic state of affairs abroad.

The purpose of the act set forth in this quotation would be defeated if in the case under consideration the relatives of the deceased should be required to bear the expenses of exhumation in order to have the remains of the deceased employee returned to the United States at the expense of the Government.

In view of my answer to the first question, it is unnecessary to answer the second.

It is my opinion that the third question should be answered in the negative.

The fact that the contract of employment, or rather reemployment, was made in Alaska does not preclude operation of the act of July 8, 1940, *supra*. It is true, as Mr. Silverman points out, that Executive Order No. 8557, *supra*, refers to the death of a Government employee "while on assignment to a post outside the United States." It is my opinion, however, that this phrase does not necessarily mean hiring or stationing in the United States. If there exists any doubt as to the meaning of this language, it has been eliminated by the decision of the Comptroller General in 21 Comp. Gen. 1100 (June 8, 1942), in which he holds that the language used in Executive Order No. 8557, while different in form, is identical in meaning with that in the statute ("while performing official duties in a Territory or possession of the United States"). The statutory language clearly covers the case under consideration. A contrary conclusion would lead to the result that Executive Order No. 8557 restricts the appli-

*May 15, 1946*

cation of the act of July 8, 1940. It can be safely assumed that the President in issuing this Executive order had no such intention.

FELIX S. COHEN,  
*Acting Solicitor.*

**DOROTHY BASSIE ET AL., APPLICANTS**  
**MARY I. CHAPMAN AND HARRY M. KIRCHNER, PROTESTANTS**

A-24015

*Decided May 15, 1946*

**Oil and Gas Leases—Applications—Compliance with Regulations.**

Applications for noncompetitive oil and gas leases under the Mineral Leasing Act, which were rejected for failure to comply with new requirements in regulations published in the Federal Register on the day the applications were filed, were entitled to reinstatement as of the date of filing where the applicants were unable reasonably to acquire actual notice of the new regulations and presumably would have complied with the new requirements, and the practice in other land offices was merely to suspend defective applications pending compliance.

**Oil and Gas Leases—Practice—Right of Protestant to Notice of Appeals.**

A junior applicant for an oil and gas lease is not entitled to notice and hearing with respect to departmental proceedings which adjudicate the rights of a prior applicant, since he gains no rights by reason of his application unless and until the prior application is finally rejected.

**Oil and Gas Leases—Applications.**

An application for an oil and gas lease which states that the applicant has no interests, direct or indirect, in other leases or lease applications in the State should not be rejected for falsity merely because it may appear that the applicant may intend, by assignment or operating agreement, to turn the lease over to some operator or other person for development.

**MOTIONS FOR EXERCISE OF SUPERVISORY AUTHORITY**

Dorothy Bassie, Minnie Mae Hefner, LaRue Dye, J. E. Dye, and Lillie Dye, filed applications for noncompetitive oil and gas leases on July 14, 1944. Their papers were in order but they did not pay at the time of filing one-half of the first year's rental as required by new departmental regulations published in the Federal Register on the same day (9 F. R. 7859; 43 CFR 192.16). For this reason the acting register rejected the applications on July 18, 1944, whereupon applicants promptly on July 26 tendered the required amounts, stating that they had just learned of the new regulations. In the interim, Mary I. Chapman had filed, on July 20, application Buffalo 038990, which conflicted with all of the previous five applications, and Harry M. Kirchner had filed, on July 22, application Buffalo 038994, which

conflicted with those of Bassie, Hefner, and Lillie Dye. Both Chapman and Kirchner paid the required rental.

Upon appeals from the register's decision by the first five applicants, the Commissioner, in a decision approved by the Department on October 11, 1944, directed the reinstatement of their applications as of July 26, subject to prior intervening applications. Upon motions for rehearing, the Department modified the decision on May 12, 1945, to direct reinstatement as of July 14, 1944, the date on which the applications were filed. The decision of May 12 rested upon the ground that although applicants were chargeable with constructive notice of the new regulations, they had no actual notice of them and could not reasonably have acquired knowledge of them, since the regulations were published at a point far from where applicants lived on the same day as that on which the applications were filed. They presumably would have paid the required rental at the time of filing if they had known of the new requirement. Furthermore, in other district land offices, applications not accompanied by rental payments were, for a time, not rejected but suspended so that the applicants would have time to make the payments.

Pursuant to the Department's decision, lease forms were sent to and executed by applicants but have not yet been issued by the Department because Kirchner and Chapman have filed separate protests against issuance of the leases and reinstatement of the applications as of July 14, 1944. The protests will be considered as motions for the exercise of supervisory power by the Secretary to review his decision of May 12, 1945.

#### 1. KIRCHNER'S PROTEST

Kirchner's protest, which is directed only to the three applications with which his is in conflict, complains that he was not advised of the proceedings in adjudicating the applications. He states that he was not notified of the "adverse claims" or of the decision of October 11, 1944; that copies of the appeals from the decision were not served upon him, and that copies of the decision of May 12, 1945, were not made available to him until the register was instructed to do so. He asserts that his application was marked "No conflicts" by the register when it was filed, and that when the Commissioner directed reinstatement of the applications as of July 26, his application had intervened and his rights to a lease were established. He asks why his application has been ignored throughout and why his rights have been adjudicated without notice, without an opportunity being given him to present his side of the picture. He contends that he is entitled to a hearing and that leases should not be issued *ex parte* under the circumstances.

May 15, 1946

Kirchner's protest is based upon the misapprehension that he acquired a right in the nature of a vested right to a lease of which he has been deprived without notice and hearing. Section 17 of the Mineral Leasing Act, as amended (49 Stat. 674, 676; 30 U. S. C. sec. 226), provides that—

\* \* \* the person first making application for the lease of any lands not within any known geologic structure of a producing oil or gas field who is qualified to hold a lease under this Act \* \* \* shall be entitled to a preference right over others to a lease of such lands without competitive bidding \* \* \*.

Carrying out this provision, the regulations of the Department provide that if more than one application for the same land is filed, "the applications will be considered in the order filed and a lease granted to the qualified applicant first in point of time in filing application" (43 CFR 192.25). Qualified applicants who filed valid applications prior to Kirchner's would be entitled to leases regardless of the merits of his application. Whether they would be issued leases would depend entirely upon the merits of their own case. Only if their applications should be rejected for some defect would Kirchner's application be entitled to consideration. While he had the privilege of protesting the prior applications under the Department's Rules of Practice (43 CFR 221.1), since it was not his application that was being adjudicated, the Department was under no obligation or duty to advise him of the action being taken upon the prior applications.

Kirchner apparently assumes that when these applications were rejected by the register and ordered reinstated as of July 26, his rights became superior by reason of his filing on July 22, and that therefore the modification of the reinstatement to make it effective as of July 14 was in derogation of his rights and should not have been made without notice and hearing afforded to him. This assumption is erroneous. No final decision on the applications was rendered until May 12, 1945, since a timely appeal from the register's decision and a motion for rehearing of the decision of October 11, 1944, prevented either decision from becoming final (43 CFR 221.48, 221.50, 221.51, 221.81). There was consequently no space of time in which Kirchner's rights attached as being paramount to the applicants'.

In any event, a copy of the decision of May 12, 1945, was made available to Kirchner; he did file a protest expressing his views of the case, and his protest has been given full consideration here. Thus his grounds for complaint have all been met. Since no contention has been made by him that the decision of May 12 is erroneous on substantive grounds and since his protest on procedural grounds has been shown to be without merit, there is no reason to disturb the decision.

## 2. CHAPMAN'S PROTEST

The protest filed by Chapman attacks all five applications on the ground that they contain false statements in that the applicants declare in the applications that they have no interest, direct or indirect, in other leases or applications for leases in the same State. Chapman charges that the applicants are merely "filing names" for The Texas Company and are being used by that Company to circumvent the acreage-limitation provisions of the Mineral Leasing Act. This charge is similar to the one made by Chapman on April 10, 1945, in this case, although she then named no company, and it was considered in connection with the decision of May 12. The only evidence offered by Chapman, however, is that applicant J. E. Dye is a pumper for Texas Gulf Products, and that applicants Lillie Dye and LaRue Dye are his wife and daughter, respectively. This is hardly indicative that applicants have any interests, direct or indirect, in other leases or applications in Wyoming, and no such interests are shown by the records of the Department.

It may be that The Texas Company or some other operator is interested in these applications or that applicants are hopeful of interesting some operator in their leases. But if the leases are assigned or operated under operating agreements, the assignee or operator will be charged with the acreage of the leases, provided they have not been committed to a unit agreement. In the absence of more of a showing than Chapman has presented that issuance of leases to applicants would not be in the public interest, the Department is not justified in refusing leases to them on the speculation that they may turn the leases over to others for development.

The protests are accordingly dismissed.

OSCAR L. CHAPMAN,  
*Acting Secretary.*

CARL NYMAN

A-24242

*Decided May 23, 1946*

### Coal Lands—Cancellation of Coal Prospecting Permit—Rights of Other Persons.

Coal prospecting permits are not automatically canceled by expiration of the 2-year period for which they are issued, and until an outstanding permit is canceled and a notation of the cancellation made in the local office no other person is permitted to gain any right to the same class of deposits by the filing of an application.



*May 23, 1946***Coal Lands—Automatic Expiration of Permit.**

Automatic expiration of a permit, as distinguished from cancellation by affirmative action of the Commissioner, is provided for only at the end of 4 years from date of issue of the permit (43 CFR 193.26; act of March 9, 1928, 45 Stat. 251; 30 U. S. C. sec. 201a).

**Coal Character of Land—Collateral Proceedings.**

While prior to the issuance of a permit any person who has an interest is allowed to submit evidence against the issuance of the permit, the permit must not, after its issuance, be placed in jeopardy in a collateral proceeding instituted by a third person claiming that no permit should have been issued in the case because no prospecting was necessary to establish the coal character of the land.

**Mineral Classification—Director, Geological Survey.**

The Director of the Geological Survey is the official expert, expressly entrusted by Congress with the "classification of the public lands and examination of the geological structure, mineral resources, and products of the national domain." Act of March 3, 1879, sec. 1 (20 Stat. 377, 394; 43 U. S. C. sec. 31); see 30 CFR, Part 201.

**APPEAL FROM THE GENERAL LAND OFFICE**

This is an appeal by Carl Nyman from the decision of the General Land Office, dated September 12, 1945, which rejected his application for a coal lease covering the NE $\frac{1}{4}$ NE $\frac{1}{4}$  sec. 20, T. 13 S., R. 8 E., S. L. M.

A coal permit, Salt Lake 063213, embracing this land was issued to J. W. Hammond on April 25, 1942 (not May 25, 1942, as erroneously stated in the Commissioner's decision of September 12, 1945). On June 19, 1945, Nyman filed an application, Salt Lake 065115, for a coal lease. It was rejected on September 12, 1945, for the reason that the permit does not expire by operation of the law until 4 years after the date of issuance and that land which is embraced in an outstanding permit is not subject to further disposition. On the same date, the General Land Office rendered a decision in Hammond's case, calling his attention to the fact that he had failed to file an application for extension of the life of the permit or an application for a preference-right lease based upon discovery of a commercial deposit of coal. The Land Office gave Hammond 30 days from notice within which to file either an application for extension or a preference-right-lease application, and, holding Hammond's permit for cancellation, stated that it will be canceled if no such application is filed within the prescribed period. A petition for a lease was filed by Hammond and is now the subject of an investigation. Consequently, Hammond's permit has not as yet been canceled.

In support of his appeal, Nyman argues that the permit as issued was limited to 2 years; that there is no provision in the law or the permit for an automatic extension, and that, since Hammond did not file an application for an extension prior to the expiration of the permit, that permit expired in 1944. Nyman also contends that it was erroneous to issue a permit in this case because the land had previously been classified as coal land so that no prospecting was necessary to determine its coal character.

Under the well-established practice of the Department, coal prospecting permits are not automatically canceled by expiration of the 2-year period for which they were issued. *Harold C. Walters and Spencer Perkins*, A. 17253, April 6, 1933 (unreported). And until an outstanding permit is canceled by the Commissioner and a notation of the cancellation made in the local office, no other person is permitted to gain any right to the same class of deposits by the filing of an application; *id.*; see, also, *Martin Judge*, 49 L. D. 171 (1922); *United States v. U. S. Borax Company* (on rehearing), 58 I. D. 426, 440 (1944).

It should be noted also that automatic expiration of a permit, as distinguished from cancellation by affirmative action of the Commissioner, is provided for only at the end of 4 years from date of issue of the permit.

Section 193.26, 43 Code of Federal Regulations, reads as follows:

**Expiration of coal prospecting permits.** Coal permits may be extended for a period of 2 years pursuant to the Act of March 9, 1928 (45 Stat. 251; 30 U. S. C. 201a, 201b). Therefore, a coal permit cannot be considered as expired until the full period for which granted and for which it may be extended has elapsed. Where application for lease has not been filed, a coal permit will, at the end of 4 years from date of issue, be considered no longer in force and no bar to other applications for the lands described therein. [Circ. 926, December 1, 1928.]

Accordingly, Hammond's permit had not expired automatically at the time Nyman filed his application for a lease (June 19, 1945). It has not expired although Hammond failed to file an application for an extension prior to the end of the original 2-year period. The act of March 9, 1928 (45 Stat. 251; 30 U. S. C. sec. 201a), authorizes the Secretary to extend permits for 2 years if he finds that the permittee has been unable to determine the existence or workability of coal deposits, "or for other reasons in the opinion of the Secretary warranting such extension." The above-quoted provision of 43 CFR 193.26, issued pursuant to that authority, makes it clear that automatic expiration of a permit is delayed in the manner specified, regardless of whether an application for an extension is filed before the end of the 2-year period. This rule, which has consistently been followed in the long-continued practice of the Land Office, is valid as a permissible regulation under the statute.

*May 27, 1946*

Nyman cannot prevail with his contention that no permit should have been issued in this case because no prospecting was necessary to establish the coal character of the land. He cannot be permitted to raise in this proceeding the question as to the coal character of the land at the time of the issuance of the permit. While prior to the issuance of a permit any person who has an interest is, of course, allowed to submit evidence against the issuance of a permit, Nyman cannot here contest the issuance of the permit which was previously granted to Hammond. The issuance of a permit creates certain rights and those rights must not be placed in jeopardy in a collateral proceeding instituted by a third person long after the issuance of the permit. In any event, Hammond's permit was issued only after the Director of the Geological Survey had made a finding, on the basis of the records of the Geological Survey and a special field report, that prospecting was necessary to determine the presence of coal in workable quantity and quality in the land. The Director of the Geological Survey is the official expert in the field, expressly entrusted by Congress with the "classification of the public lands and examination of the geological structure, mineral resources, and products of the national domain." Act of March 3, 1879, sec. 1 (20 Stat. 377, 394; 43 U. S. C. sec. 31); see, also, Chapter II, Part 201 of 30 CFR, entitled "Geological Survey—Classification of Public Coal Lands."

It follows that at the time Nyman filed his application, the land was not subject to a coal-lease application. The decision of the Commissioner of the General Land Office was correct and is affirmed.

OSCAR L. CHAPMAN,  
*Acting Secretary.*

## INVENTION OF LOW TEMPERATURE DEHYDRATOR FOR BULK MATERIALS

### Order No. 1763—Inventor's Governmental Duties—Research or Investigation.

An industrial engineer employed by the Bonneville Power Administration is engaged in research or investigation, within the meaning of Departmental Order No. 1763 of November 17, 1942, if his duties require him to assist in the development of new industrial uses for electric power and to engage in studies concerning electrical applications in production processes.

An employee of the Interior Department is engaged in research or investigation, within the meaning of Order No. 1763, even though his work normally requires him merely to apply known principles to practical problems, if good craftsmanship and professional competence require him to engage in research or investigation in an effort to reach an adequate solution to a practical problem confronting him.

An industrial engineer who develops a Low Temperature Dehydrator for Bulk Materials in the course of assigned duties of conducting research into the development of new uses for electric power and engaging in studies upon the dehydration and concentration of foods is required to assign it to the Government under Order No. 1763.

M-34481

MAY 27, 1946.

THE SECRETARY OF THE INTERIOR.

MY DEAR MR. SECRETARY: My opinion has been requested pursuant to Departmental Order No. 1871 of September 7, 1943, concerning the relative rights of the Government and the inventor in a Low Temperature Dehydrator for Bulk Materials, invented by Mark M. Clayton, an industrial engineer employed by the Bonneville Power Administration at Portland, Oregon.

The invention is an electrically operated device for removing moisture from bulk material, such as seeds, that cannot be heated substantially above ordinary atmospheric temperatures without deterioration. As an industrial engineer, Mr. Clayton's duties relevant to this opinion, as set forth in his job description, are:

To ascertain the studies needed covering power service to prospective industrial and commercial customers \* \* \*; to suggest to the Division of Industrial and Resources Development or other divisions concerned the preparation of such studies; in certain instances, as directed by the Chief of that Division or divisions, to undertake these studies; to transmit findings and recommendations of these studies as approved by the Chief of that Division or divisions to prospective customers; and to work with the customers on ways of carrying out the recommendations. Specific examples of such studies to be recommended include studies \* \* \* concerning electrical applications in production processes such as \* \* \* concentration and dehydration of foods, etc. \* \* \*.

The Acting Manager of the Lower Columbia District, Bonneville Power Administration, in a memorandum dated March 1, 1946, makes the following analysis of the relationship between Mr. Clayton's official duties and his invention of a Low Temperature Dehydrator:

\* \* \* his duties are to give technical assistance and consultation to distributors of electric power in the District. More specifically, his duties are to assist distributors and their customers in the development of new industrial uses for electric power. This work is normally accomplished by making studies of existing processes and making recommendations for the substituting of electricity for other types of power. In some cases where a new process is being installed Mr. Clayton makes recommendations for applying standard equipment obtainable from regular suppliers or manufacturers to the process. It is not intended that the Industrial Engineer will invent equipment to accomplish new uses for electric power.

Mr. Clayton was not assigned to the problem of inventing a Low Temperature Dehydrator but has voluntarily attempted the development of such equipment on his own initiative. \* \* \*

*May 27, 1946*

It appears from Mr. Clayton's job description as interpreted by his supervisor that his duties principally consist of making technological and economic studies of the feasibility of substituting electric power for other forms of power, and recommending equipment to be used in making these changes. These primary responsibilities, however, do not negate or obviate his further duties of conducting original research upon request, or suggesting the subjects of original research for others to follow. He is required to work with customers on ways of carrying out recommendations for the use of power, and, as stated by his supervisor, "to assist \* \* \* in the development of new industrial uses for electric power." Such an assignment contemplates research and investigation, whenever the occasion arises, even though Mr. Clayton may normally merely recommend the use of standard equipment. His job description specifically requires him to study electrical applications in production processes, such as the concentration and dehydration of foods.

The memorandum from Mr. Clayton's supervisor points out that it was not intended that he should invent equipment to accomplish new uses for electric power, and that Mr. Clayton was not assigned to the problem of inventing a Low Temperature Dehydrator, apparently upon the assumption that an assignment of the invention to the Government is not required unless the inventor is specifically assigned to invent. Departmental Order No. 1763 of November 17, 1942, however, provides that an invention "will be considered within the general scope of the governmental duties of an employee," and will be required to be assigned to the Government whenever the employee's duties "include research or investigation, or the supervision of research or investigation, and the invention arose in the course of such research or investigation and is relevant to the general field of an inquiry to which the employee was assigned."

Mr. Clayton was engaged in research and investigation. The invention is directly in the field of his assigned inquiries and arose in the course of his duties of research and investigation. It is, therefore, required by Order No. 1763 to be assigned to the Government.

However, even if Mr. Clayton's regular duties did not include research or investigation, assignment of the invention to the Government would be required in the particular circumstances upon the theory summarized in Solicitor's opinion of September 19, 1944, 58 I. D. 738, in the following language:

If an employee's duties, either as described in his job sheet or as assigned by his supervisors, involve the application of known principles to practical problems and such existing solutions as may be known to the employee are unsatisfactory, and if in these circumstances good craftsmanship and professional competence

require the employee to engage in research or investigation in an attempt to reach an adequate solution, an employee given such an assignment is considered to be engaged in research or investigation.

Mr. Clayton was required to make recommendations to industry concerning the use of electric power for various purposes, including dehydration and concentration. Existing methods of dehydrating bulk materials at low temperatures were inadequate. Therefore, the satisfactory performance of Mr. Clayton's duties of advising industry included an attempt to develop the invention which he did, in fact, develop. It follows that, in inventing his Low Temperature Dehydrator, he was engaged in research and investigation within the meaning of Order No. 1763, and that the invention arose in the course of, and is relevant to, his assigned duties of research.

Since the invention was made as a result of Mr. Clayton's assigned duties, it is immaterial whether it was developed on his own or Government time, with or without the use of Government facilities or financing.

WARNER W. GARDNER,  
*Solicitor.*

ELMER R. CHANDLER  
DAN O'KEEFFE

A-24137

*Decided May 29, 1946*

**Grazing Leases—Contractual Right of Renewal.**

The holder of a section 15 grazing lease which contains a provision giving him a preference right to a new lease is entitled to a renewal of his lease even as against a preference-right claimant to a lease on the land.

**Grazing Leases—Imposition of Conditions on Renewal.**

On the renewal of a grazing lease, the condition may be imposed that certain of the lands leased shall be subject to use by an adjoining stockman as a passageway for his stock.

**APPEAL FROM THE GENERAL LAND OFFICE**

On December 30, 1942, Dan O'Keeffe filed grazing-lease application, Sacramento 034886, for certain land in T. 46 N., R. 2 E., M. D. M. By the Assistant Commissioner's decision of October 28, 1943, O'Keeffe was offered a lease for all of the land applied for, except 120 acres (SE $\frac{1}{4}$ SE $\frac{1}{4}$  sec. 19, E $\frac{1}{2}$ NE $\frac{1}{4}$  sec. 30), and for 240 acres in addition. The decision stated that the 120 acres were being offered to Elmer R. Chandler since he could use them to better advantage. O'Keeffe signed the lease forms but filed on November 16, 1943, a supplemental application which, as amended on December 3, requested a lease on

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additional land, including the  $S\frac{1}{2}SE\frac{1}{4}$ ,  $SE\frac{1}{4}SW\frac{1}{4}$  sec. 19,  $NE\frac{1}{4}$  sec. 30, same township, and the  $N\frac{1}{2}$ ,  $E\frac{1}{2}SW\frac{1}{4}$ ,  $N\frac{1}{2}SE\frac{1}{4}$ ,  $SW\frac{1}{4}SE\frac{1}{4}$  sec. 24;  $NW\frac{1}{4}$ ,  $NE\frac{1}{4}SE\frac{1}{4}$ ,  $NW\frac{1}{4}SW\frac{1}{4}$  sec. 25, in adjoining T. 46 N., R. 1 E. This land included the 120 acres offered to Chandler, and the rest of it was embraced in a 1-year grazing lease, Sacramento 029619, issued to Chandler on August 14, 1942. Chandler's lease also included the 240 acres offered on October 28 to O'Keeffe. On the same date, Chandler was offered a 5-year renewal lease, excluding the 240 acres but including the 120 acres.

Subsequently, on May 2, 1944, the Assistant Commissioner modified his decision to reduce to 4 years the term of the renewal lease offered to Chandler, and suspended action on O'Keeffe's supplemental application for further consideration upon the expiration of Chandler's renewal lease and another lease.<sup>1</sup> O'Keeffe promptly appealed, contending that he owned land contiguous to the land applied for by him but awarded to Chandler; that Chandler's privately owned lands were noncontiguous to the land offered him; and that he, O'Keeffe, needed the disputed land more than Chandler did. Accepting these contentions as showing O'Keeffe to be, and Chandler not to be, a preference-right applicant under section 15 of the Taylor Grazing Act, as amended (49 Stat. 1976, 1978; 43 U. S. C. sec. 315m), and treating the appeal as a protest, the Commissioner modified his decision on July 12, 1944, to reduce further to 1 year the term of the renewal lease offered Chandler. The lease was executed and Chandler then filed a petition for its renewal from August 14, 1944. In the meantime, the lease offered O'Keeffe had been issued for a 5-year period commencing May 12, 1944.

Finally, on March 19, 1945, the Acting Assistant Commissioner offered Chandler and O'Keeffe, respectively, 5-year leases for the lands in question, stating that the portions offered to each were necessary to permit proper use of his base lands. This decision actually changed the previous award of lands with respect only to three 40-acre tracts, the  $SE\frac{1}{4}SW\frac{1}{4}$ ,  $SW\frac{1}{4}SE\frac{1}{4}$  sec. 24, and the  $SE\frac{1}{4}SW\frac{1}{4}$  sec. 19. These three tracts had been included in Chandler's original lease of August 14, 1942, and the renewal lease which expired August 14, 1944, and were part of the lands applied for by O'Keeffe. Action on the first tract was suspended pending determination as to the advisability of withdrawing it as a stock driveway, and the other two tracts were awarded to O'Keeffe. O'Keeffe's protest (appeal) was dismissed, his supplemental application rejected, and Chandler's renewal petition denied as to the three tracts excluded from the lease offered him.

<sup>1</sup> This was 5-year grazing lease, Sacramento 034079, issued to Roland F. Souza on July 27, 1942. Souza's lease included land in sec. 13, T. 46 N., R. 1 E., which O'Keeffe also asked for in his supplemental application.

From this decision O'Keeffe has again appealed, although he signed his lease forms. He reiterates his need for the land which has been offered to Chandler,<sup>2</sup> the contiguity of the land to his privately owned holdings and its remoteness from Chandler's property, and the injustice of the award of an almost equal amount of land to himself and Chandler in view of the latter's small livestock and landholdings. Chandler appears to be satisfied with the award since he has executed the lease forms sent to him without protest or appeal.

This case presents a familiar situation upon which the Department has had occasion to comment recently. *H. Glendon Culverwell, A. 24076*, April 12, 1946 (unreported), and *J. S. Parsons and Clara Parsons*, 59 I. D. 210 (1946). Conflicting applicants for grazing lands, each with a meritorious claim for the same land, are unable to agree among themselves as to just how the lands shall be divided. The Department is forced to consider the matter, field investigations are made, and upon the basis of the facts ascertained awards are made which the Department believes are equitable to all the parties. This pattern has been repeated here, and the decision appealed from represents the Commissioner's best judgment, based upon field reports and facts and showings in the record, as to what constitutes a fair division of the lands between the parties. Upon a review of the record in the light of O'Keeffe's contentions, it cannot be said that the Commissioner's apportionment is unfair. Particularly is this so in view of the fact that the record shows that Chandler, as well as O'Keeffe, is a preference-right claimant.

It is not necessary, however, or even proper to decide this case on the basis of fairness of the apportionment, for a determining factor has not heretofore been considered in the Commissioner's decisions. Chandler's lease of August 14, 1943, the renewal of which is here in question, provides that "if at the end of said period [of the lease] it shall be determined that a new lease should be granted, the lessee herein will be accorded a preference right thereto upon such terms and for such duration as may be fixed by the lessor." Construing this provision, the Department has consistently held in numerous cases that it gives the lessee a contractual right to a renewal of the lease even over a section 15 preference-right applicant.<sup>3</sup> In view of this holding,

<sup>2</sup> O'Keeffe refers in his appeal to particular tracts of land. His description of the tracts is confusing and erroneous to some extent. Thus he says that his application to lease the SE $\frac{1}{4}$ SW $\frac{1}{4}$  sec. 19 has been refused, whereas it has been awarded him as lot 1 of the SW $\frac{1}{4}$  sec. 19. He also complains of the refusal to lease him the E $\frac{1}{2}$ SE $\frac{1}{4}$  sec. 13, T. 46 N., R. 1 E. The Commissioner's decision of May 2, 1944, pointed out that this land was in Souza's lease (see footnote 1).

<sup>3</sup> *W. C. Condict, A. 23366*, June 24, 1942; *H. Glendon Culverwell, A. 24076*, March 7, 1946; *Estate of D. M. Oberman, A. 24176*, March 25, 1946; *Gerald M. Darrow, A. 24211*, April 12, 1946; *Alva Smith, A. 24136*, April 12, 1946 (all unreported); and *J. S. Parsons and Clara Parsons*, 59 I. D. 210 (1946).



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it must be concluded that regardless of the merits of O'Keeffe's claims, Chandler is entitled to a renewal of his lease for the same land embraced in it. The Commissioner's decision is, therefore, erroneous in awarding the SW $\frac{1}{4}$ SE $\frac{1}{4}$  sec. 24 and the SE $\frac{1}{4}$ SW $\frac{1}{4}$  sec. 19 to O'Keeffe. As for eliminating the SE $\frac{1}{4}$ SW $\frac{1}{4}$  sec. 24 pending determination as to whether it should be included in a stock-driveway withdrawal, the Commissioner's action is valid in view of the reservation by the United States in the lease of "the right to reduce the leased area \* \* \* if it is determined that such area is required for \* \* \* stock driveways."

From the fact that he executed the lease forms sent to him without protest, it may be that Chandler is willing to let O'Keeffe have the two 40-acre tracts erroneously awarded to him. However, his intentions in that respect should be ascertained. As for the tract contemplated for use as a stock driveway, the SE $\frac{1}{4}$ SW $\frac{1}{4}$  sec. 24, it appears that O'Keeffe would be the only person who would need to use it. In that case it would appear more appropriate to include the tract in Chandler's renewal lease, subject to a stipulation in the lease that O'Keeffe may use it to the extent necessary for traveling his stock between his fee lands separated by that tract. If Chandler wishes to retain the SW $\frac{1}{4}$ SE $\frac{1}{4}$  sec. 24, which adjoins the tract discussed, it should also be subjected to O'Keeffe's right to use it as a passageway. The imposition of these conditions in Chandler's renewal lease may be validly required. *Everett v. Adobe Park Grazing Association*, A. 22092, June 29, 1940 (unreported). In any event, since Chandler's present lease expired on August 14, 1944, and since one other grazing lease (Sacramento 034079, Roland F. Souza) in the immediate area will expire July 27, 1947, and it appears that the areal leasing pattern may have to be revised because of the changing ownership and control of private lands, Chandler should be offered a renewal lease for a term of 3 years, and the lease offered O'Keeffe should provide for expiration at the same time. Prior to that date, the interested parties in the vicinity should attempt to reach an agreement as to a proper division of the grazing lands. Otherwise another field investigation will be ordered to determine the proper division to be made.

The Commissioner's decision of March 19, 1945, is modified, and the case is remanded to the General Land Office for a revision of the leases offered to Chandler and O'Keeffe in accordance with the provisions of this decision.

OSCAR L. CHAPMAN,  
*Acting Secretary.*

## OWNERSHIP OF THE MINERAL ESTATE IN THE HOPI EXECUTIVE ORDER RESERVATION

Executive Order Indian Reservations—Indian Title—Indian Use and Occupancy—Tribal Mineral Ownership—Tribal Mineral Leases—Departmental Recognition of Indian Tribal Representatives.

The Executive order of December 16, 1882, set aside certain lands for the use and occupancy of the Hopi Indians "and such other Indians as the Secretary of the Interior may see fit to settle thereon." At that time, and for years prior thereto, the lands were occupied by the Hopi Indians and by Navajo Indians, and Navajos continued thereafter to settle within the area. Funds appropriated for Federal services, such as the education of Indian children, have been used throughout the years for the benefit of Hopis and Navajos living within the area, and the Secretary has regulated the grazing of the livestock on the reservation belonging to Hopis and Navajos, no action being taken to prevent the further settlement of Navajos until the Secretary declared that Navajo Indians would not be permitted to settle on the reservation after the date of ratification of the Hopi constitution.

The historical background shows that the intention of the Executive order was to create the reservation for the Hopi Indians and for the Navajo Indians then living within the area, with the further settlement of Navajos to be permitted in the discretion of the Secretary. Under this construction, it is held that the Hopi Indians and those Navajos within the area who settled in good faith prior to the date of ratification of the Hopi constitution have coextensive rights with respect to the natural resources of the reservation, including the mineral estate.

Under the act of May 11, 1938 (52 Stat. 347; 25 U. S. C. secs. 396a-f), lands within the Hopi Executive Order Reservation may be leased for mining purposes, with approval of the Secretary, by authority of the Hopi Tribal Council and the duly authorized representatives of the Navajos having rights within the reservation. The preparation of a roll identifying the individual Indians entitled to participate in the mineral estate is unnecessary unless it is intended that the proceeds of mineral leasing be individualized.

M-33821

JUNE 11, 1946.

THE SECRETARY OF THE INTERIOR.

MY DEAR MR. SECRETARY: The Commissioner of Indian Affairs has requested that you obtain my opinion on the following question:

Is the mineral estate in the Hopi Executive Order Reservation the sole property of the Hopi Tribe; and if not, what is the extent of the interest of the Hopi Tribe, and what is the extent of the interest of the non-Hopi Indians who are legally occupying part of the Hopi Executive Order Reservation?

The so-called Hopi Executive Order Reservation embraces some 2½ million acres in northern Arizona, having been created out of the public domain by an order of the President, dated December 16, 1882, which set aside the area "for the use and occupancy of the

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Moqui [Hopi] and such other Indians as the Secretary of the Interior may see fit to settle thereon." The Hopi Indians have occupied this general area as their ancestral home for centuries, living, for the most part, in villages located on the high mesas. At least since the early part of the nineteenth century, however, Navajo Indians have also lived within the area, and the Indian population has steadily grown from approximately 2,000 in 1882 to over 7,000 today.<sup>1</sup> The two Indian groups have retained their separate tribal affiliations and have never been able to agree on a reservation boundary or a division of land use. The reservation is heavily overgrazed, and as the population has grown the dispute between the Hopis and the Navajos within the area has reached serious proportions.

Any determination of the comparative rights of the two Indian groups must, of course, take into consideration the historical background of the ancient dispute between them. The problem out of which that dispute has grown, however, is largely one of economics,<sup>2</sup> and its solution depends upon factors that are primarily administrative rather than legal. No attempt will be made to solve it in this opinion. I understand that the Commissioner's request for my views was prompted by inquiries he has received as to the procedure to be followed in offering the lands for mineral development under the act of May 11, 1938 (52 Stat. 347; 25 U. S. C. secs. 396a-f), which provides that the "unallotted lands within any Indian reservation \* \* \* may, with the approval of the Secretary of the Interior, be leased for mining purposes, by authority of the tribal council or other authorized spokesmen for such Indians \* \* \*." This question of leasing procedure may be decided upon legal grounds.

In an opinion of February 12, 1941, Solicitor Margold considered and ruled upon the question of whether the Department could, without the consent of the Indians, define a reservation boundary between the Hopis and Navajos living within the Executive order area, thereby creating grazing districts for the exclusive use of the respective groups. It was there held, specifically, that the definition of such a boundary would be in violation of legislation which prohibits the creation of Indian reservations or changes in the boundaries of exist-

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<sup>1</sup> In 1882, the population consisted of approximately 1,800 Hopis and "a few hundred" Navajos. (See the Commissioner's letter of December 13, 1882, to the Secretary, recommending creation of the reservation.) Today there are 3,000 Hopis and 4,000 Navajos living there. (See the report of the Hopi Agency for March 1944, entitled "Long Range Program for the Hopi Tribe.")

<sup>2</sup> The Congress is fully cognizant of the dispute between these Indians and the economic aspects thereof. See part 18 of the Survey of Conditions of the Indians in the United States, Hearings before the Senate Subcommittee on Indian Affairs, 71st Cong., 3d sess. (1931); Hearing before the Senate Committee on Indian Affairs, 72d Cong., 2d sess. (1932), on Boundary, Navajo-Hopi Indian Reservation; and Hearings before the House Committee on Indian Affairs, 79th Cong., 1st sess. (1945), on the Hopi Tribe.

ing reservations without authority of Congress. It was also held that the definition of such a boundary would violate the rights of the Hopi Indians within the 1882 reservation area and would violate the provisions of their constitution, which was approved on December 19, 1936. In discussing the rights of the Hopi Indians, it was demonstrated in the opinion that under the Executive order they acquired the usual Indian title which could not be divested by departmental fiat, but that their rights were not exclusive. It was also shown that Navajo Indians were living within the area when the reservation was created in 1882 and that Navajos in increasing numbers have continued to settle there. Although I believe it is implicit in the opinion mentioned that the individual Navajos have rights within the reservation, the extent of those rights, as compared to those of the Hopis, was not discussed, and, since there appears to be considerable confusion on the point among the Indians and others, I believe it desirable that the Department clarify its position on the matter now.

The Executive order of 1882 was promulgated upon the recommendation of this Department. The records of this Department are, therefore, the most trustworthy source of acceptable evidence as to the meaning and effect of the order. *Cf. Sioux Tribe of Indians v. United States*, 316 U. S. 317 (1942). When the records relating to events leading to the creation of the reservation are considered together with those showing the course of administrative action thereafter taken, the meaning and effect of the Executive order becomes reasonably plain. At the time the reservation was created in 1882 the Secretary was well informed as to conditions among the Hopis and the Navajos by reports he had received from United States Indian Inspectors and from the Commissioner of Indian Affairs.<sup>3</sup> By a treaty of June 1, 1868 (15 Stat. 667), a reservation had been established for the Navajos in an area lying to the east of the 1882 Executive order area. The Navajo Tribe relinquished under that treaty their tribal claims to lands outside the treaty reservation and agreed to assist in resettling within the treaty reservation the large number of individual Navajos living outside those boundaries. Little or no success was had, however, in effecting the removal of these individual Navajos, and since the usable portion of the treaty reservation was far too small to support the rapidly growing Navajo population, no serious effort was made to accomplish the resettlement. Instead, an attempt was made to handle the administrative problem

<sup>3</sup> E. g., the reports of Inspector Vandever, September 25, 1873 (1385/1873); Inspector Daniels, August 16, 1874 (117/1874); Inspector Vandever, for 1877 (1731/1877); Inspector Howard, July 31, 1882 (15060/1882); Inspector Howard, November 29, 1882 (1403/1882), and the Annual Reports of the Commissioner of Indian Affairs.

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by a series of Executive orders making additions to the Navajo Reservation.<sup>4</sup>

The reports show that during all this period prior to 1882 the Hopis were complaining of the encroachments and depredations of the Navajos and non-Indians in their midst. As their forefathers had done before them, the Hopi Indians lived in their villages high on the mesas, coming down into the more fertile valleys only to tend stock and to tend small farming units. All efforts to remove them to the valleys met with failure, and their traditional habits of life made it difficult, if not impossible, for them to protect themselves against the encroachments of the whites and the Navajos. The Indian agent who had jurisdiction over the Hopis and Navajos within the area was handicapped in dealing with the situation because the land was part of the public domain. In a report of May 1, 1879, Agent Mateer reported numerous intrusions by the whites and asked if there were not "some law by which the Indians can be protected in their rights to lands which they have cultivated for a century or more." In comprehensive reports covering the entire Navajo-Hopi area, submitted in July and November 1882, Inspector Howard estimated that the Navajos living in Arizona to the west of the Navajo Reservation numbered 8,000 and the Hopis numbered some 2,000. As to the capacity of the Navajo Reservation to sustain all of the Navajo Indians, he stated that if those living in Arizona outside the Navajo reservation were crowded back on the reservation, "it would become necessary for the United States Government to feed them." He recommended the establishment of a new reservation for the Arizona Navajos and the Hopis combined, with a separate agent for these two groups. He concluded that if his recommendation were adopted and the lands were given a reservation status, the encroaching whites could be excluded, and with a combined agency the agent could umpire the controversies between the Hopis and the Navajos, possibly issuing certificates of title to the settlers within the area from both tribes.

The matter finally came to a head as a result of the activities of certain white persons. In a letter to the Commissioner of November 11, 1882 (21371/1882), Agent Fleming reported open defiance of his authority by a group of white settlers, and a resultant loss of his

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<sup>4</sup> Extension of the Navajo Reservation boundaries has continued by sundry Executive orders and statutes, the last being the act of June 14, 1934 (48 Stat. 960). Today the Hopi Executive Order area lies wholly within the exterior boundaries of the Navajo Reservation, and since the latter is still insufficient for the needs of the Navajos, the problem of resettlement of the excess population living within the Hopi area is thus immeasurably complicated.

prestige and influence with the Indians. He strongly urged that corrective action be taken, failing which he would tender his resignation. In response, the Commissioner instructed Agent Fleming to submit a description of boundaries for a reservation that would include the Hopi villages and the agency site and be "large enough to meet all needful purposes and no larger." After the land descriptions were submitted, the Commissioner recommended to the Secretary the transmittal to the President of an order setting aside the area described "for the use and occupancy of the Moqui [Hopi] and such other Indians as the Secretary of the Interior may see fit to settle thereon." In making this recommendation the Commissioner pointed to the peaceful habits of the Hopi Indians and to the difficulties encountered in dealing with the white settlers due to the want of reservation status for the lands. It was the order thus recommended that the President signed on December 16, 1882.

The factual situation delineated above shows clearly, in my opinion, that it was the intention in creating the reservation to set aside the lands for the use and occupancy of the Hopi Indians and for the use and occupancy of the Navajos then living there, and to permit the continued settlement of Navajos within the area in the discretion of the Secretary. Had there been any intention of disturbing the Navajos then occupying the area, it would have been a comparatively simple thing to draft the Executive order so as to create a reservation exclusively for the Hopis. But that was not done. The prime need at the time was to provide Indian reservation status for lands long occupied by Hopis and Navajos alike, and to retain administrative authority over the further settlement of Navajos within the area. This was precisely what the Executive order of 1882 accomplished.

The foregoing views are borne out by the history of subsequent events. Except for action taken by the military in 1890-1891 to protect the Hopis in their peaceful occupation of the traditional village areas,<sup>5</sup> and the action taken by the Department in more recent years in connection with the necessary conservation of the range, no action was taken to prevent the settlement of Navajos within the 1882 reservation until the Department took the position in a letter to the Superintendent, on January 8, 1942, that Navajos would not be allowed to settle on the reservation after October 24, 1936, the date of ratification of the Hopi constitution.<sup>6</sup> I do not mean to imply that the

<sup>5</sup> See Indian Office files, Letters Received, files Nos. 2914/1891; 4417/1891; 6567/1891; 25561/1891.

<sup>6</sup> As previously stated, the reservation is now overpopulated. Since it was undoubtedly not intended that the settlement of non-Hopis continue beyond the "saturation point," it was perfectly proper for the Secretary to recognize that the point had been reached and to declare that the further settlement of Navajos would not be permitted.

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Navajos could acquire rights in the reservation through the Secretary's inaction or through his failure to exercise the discretion vested in him by the Executive order. But the Secretary is not chargeable with neglect in this matter. Throughout the years the Secretary has sought and obtained funds from Congress which have been used for the education of the children of Hopis and Navajos alike, and the grazing of the livestock of both groups has been permitted and regulated by the Secretary. This, to my mind, is conclusive evidence that the settlement of the Navajos on the reservation has been sanctioned and confirmed by the Secretary, and that their settlement is therefore lawful, resulting in the necessity of recognition of their rights within the area.

The Executive order of 1882 provided that the lands were set aside for the "use and occupancy" of two classes of Indians, namely, the Hopis and others settled by the Secretary. As Solicitor Margold pointed out in the opinion of February 12, 1941, this was a usual form of Indian title, carrying with it the rights normally incident to such title. It would be a violation of the clear language of the Executive order to distinguish between the quality of estate acquired by the two groups, and I therefore hold that the rights of the Navajos within the area who settled in good faith prior to October 24, 1936, are coextensive with those of the Hopis with respect to the natural resources of the reservation. It is settled by now, of course, that the mineral estate is in the Indians. See the act of March 3, 1927 (44 Stat. 1347; 25 U. S. C. sec. 398a), and *cf. United States v. Shoshone Tribe of Indians*, 304 U. S. 111 (1938).

As previously stated, the act of May 11, 1938, *supra*, provides that the unallotted lands of an Indian reservation may be leased for mining purposes, with the approval of the Secretary, "by authority of the tribal council or other authorized spokesmen for such Indians." The term "such Indians" obviously refers to the Indian owners of the reservation. The fact that the Indian owners are of different tribal or ethnic groups should be no obstacle to leasing under the act. The Hopi Indians have a Tribal Council which is empowered by Article VI, section 1 (c), of their approved constitution to handle such matters. But the Navajos having rights within the reservation are not members of the Hopi organization, and the Hopi Tribal Council would, therefore, have no authority to represent them. It is my understanding that these Navajos are represented on the Navajo Council for certain purposes, but whether such representation would suffice for the purpose of approving mining leases, or whether a special council should be called to designate representatives of the Navajos of the Hopi Reservation, are administrative questions which should

be considered in the first instance by the Indian Service. Any lease executed as authorized by the Hopi Council and the representatives of the Navajos concerned would, upon approval by the Secretary, satisfy the requirements of the 1938 act and bind all of the Indian owners of the reservation. No necessity would arise for the preparation of a roll identifying all of the individual Indians entitled to participate in the mineral estate unless it were intended to individualize and distribute among the Indians the proceeds derived from mineral leasing.

FELIX S. COHEN,  
*Acting Solicitor.*

Approved:

OSCAR L. CHAPMAN,  
*Acting Secretary.*

O. O. COOPER ET AL.

A-24208

*Decided June 14, 1946*

**Public Sale—Isolated-Tract Application—Inclusion of Land in National Forest.**

The previous filing of an application for purchase as an isolated tract (Rev. Stat. sec. 2455, as amended; 43 U. S. C. sec. 1171) did not create a "valid claim" so as to except the land from a proclamation establishing a national forest, nor did it affect the authority of the President to include the land in the national forest; consequently, the promulgation of the proclamation precludes favorable action on the previously filed application.

**Surveys—Location of Corners and Lines by Official Surveys—Hiatus Left by Separate Surveys.**

When the locations of corners and lines established by an official Government survey are identified, they are conclusive, and the corner of a Government subdivision is where the United States surveyors in fact established it, whether such location is right or wrong, so that in the instant case where R. 8 E. and R. 7 E. were established by independent surveys and the west line of R. 8 E. and the east line of R. 7 E. are not identical, R. 7½ E. was subsequently established, with the result that lands in R. 7½ E. were not granted under the patents to the lands in Rs. 7 and 8 E.

**APPEAL FROM THE GENERAL LAND OFFICE**

This is an appeal from a decision of the Assistant Commissioner of the General Land Office, dated March 26, 1945, which rejected an application for the sale of an isolated tract under the second proviso of section 2455 of the Revised Statutes, as amended (43 U. S. C. sec. 1171).



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Acting for and on behalf of the Feather River Pine Mills, a California corporation, O. O. Cooper, its president, filed an application on October 16, 1944, to purchase lots 1, 2, 3, 4, sec. 6, and lots 1, 2, 3, sec. 7, T. 21 N., R. 7½ E., M. D. M., California. The applicant stated that the corporation owns section 1 and section 12, except lots 8 and 16, in T. 21 N., R. 7 E.; section 6, except the SE¼NW¼ and the NW¼SE¼, and section 7, except lot 2, and the NE¼NE¼, in T. 21 N., R. 8 E. He stated that "Feather River Mills intends to use the tract as a unit with its surrounding holdings, in its logging operations or any other operations the Company may have in the future." Cooper also submitted an affidavit in which he explained that a patent had been issued in September 1904 to John F. Brinkers under the timber and stone act for lot 5 and the NW¼SE¼ of sec. 1, T. 21 N., R. 7 E., and lots 3, 4, 5, and 6, of sec. 6, T. 21 N., R. 8 E., M. D. M.; that there was no indication at that time that the two ranges were not contiguous, and that the lands patented to Brinkers were separated into two noncontiguous parcels only on the basis of a new survey made in 1928.

The Assistant Commissioner rejected the application on the ground that the land applied for was withdrawn and added to the Plumas National Forest by Proclamation No. 2635 of January 13, 1945 (59 Stat. 853; 10 F. R. 693).

On appeal, it is argued that retroactive effect was given to the proclamation and that this violates equitable principles. The assertion is also made that because the establishment of Range 7½ East had the result of illegally depriving patentees of land granted to them, the survey of 1928 was void.

By the proclamation, the land here in question was added to the Plumas National Forest, pursuant to the authority conferred by the acts of February 20, 1925 (43 Stat. 952), June 22, 1938 (52 Stat. 838), and June 5, 1942 (56 Stat. 311; 16 U. S. C. sec. 482i). The proclamation excepted from its operation "any land which is at this date embraced in any valid claim." It provided that the reservation shall "be subject to, and shall not interfere with or defeat, legal rights under such claim \* \* \* so long as such claim is legally maintained \* \* \*." No such "valid claim" was created by the filing of the application for the purchase of the lots. While the filing segregated the land "from other disposition under the public land laws" (43 Code of Federal Regulations 250.7), this did not affect the authority of the President to include the land in a forest reservation. *Ellen M. Sweetland*, 41 L. D. 370 (1912); see *Svetozar Igali*, 40 L. D. 105 (1911). Since promulgation of the proclamation, the lots applied for are no longer subject to sale. Thus, it prevents the

granting of the previously filed application. In this sense it has a retroactive effect. But the filing of the application created no rights to the land. Hence, the fact that the proclamation had the effect of requiring denial of the application is legally unobjectionable. *Ellen M. Sweetland, supra*; see, also, *Administrative Ruling*, 43 L. D. 293 (1914).

It may be noted also that by the proclamation an aggregate of 2,634.63 acres was added to the Plumas National Forest. The land here involved amounts to 87.47 acres. Clearly, there is thus no basis for appellant's suggestions that "Evidently the filing of appellant's application to purchase was the sole and only cause of the Proclamation of Withdrawal."

An inquiry was directed to the Department of Agriculture as to whether that Department would agree to a modification of the proclamation which would eliminate the land applied for from the Plumas National Forest. The Department of Agriculture which, together with this Department, has the statutory function of determining whether land is chiefly valuable for national-forest purposes (see 16 U. S. C. sec. 482i) has answered that it cannot agree to any such modification.

The facts of the case disprove appellant's assertion that the establishment of Range 7½ East deprived certain patentees of land granted to them. Before the lots now contained in T. 21 N., R. 7½ E. were given their present designation and R. 7½ E. was established under the survey of 1928, they constituted a pencil-shaped hiatus between the survey by Deputy Surveyor Reilly in 1896, approved in 1900, of secs. 1 and 12 of T. 21 N., R. 7 E., and the survey by Deputy Surveyor Hall in 1884 of secs. 6 and 7 of T. 21 N., R. 8 E. In other words, the west line of R. 8 E. and the east line of R. 7 E. are not identical. The origin of that discrepancy is as follows: Although Reilly, when making his survey in 1896, reported finding the corner of Tps. 21 and 22 N., Rs. 7 and 8 E., and other corners south thereof, all as established by Hall in 1884, he nevertheless, for no apparent reason, established other corners. He established another township corner at a point 21.33 chains south and 7.72 chains west of the Hall true meridian corner, and also established two other corners in positions almost due south of his township corner. Those three corners mark the eastern boundary of T. 21 N., R. 7 E., as surveyed by Reilly, and explain why a hiatus exists between the Hall survey of the west boundary of secs. 6 and 7, T. 21 N., R. 8 E., and the Reilly survey of secs. 1 and 12, T. 21 N., R. 7 E.

Deputy Surveyor Heister, when surveying the lot lines of R. 7½ E., found both the Reilly corners and the Hall corners on the ground,

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and that definitely demonstrates the existence of the hiatus from the time of the Reilly survey. It is a rule that, when the locations of corners and lines established by an official Government survey are identified, they are conclusive and the corner of a Government subdivision is where the United States surveyors in fact established it, whether such location is right or wrong. *Vaught v. McClymond*, 155 P. (2d) 612, 616 (1945); cf. *New Mexico v. Colorado*, 267 U. S. 30, 39 (1925). In this case there were two complete, independent surveys, and all patents were issued subsequent thereto. As a consequence, the several patents which were issued for the land in R. 7 E. are governed by the Reilly survey, and the patents for the land in R. 8 E. are controlled by the Hall survey.<sup>1</sup> The hiatus lands were unsurveyed until the approval of the 1928 survey and therefore were not granted under the patents to the lands in Rs. 7 and 8 E. Neither Brinkers nor any of the other patentees of land in Rs. 7 and 8 E. received title to any of the land now embraced in R. 7½ E., so that the survey of 1928 did not deprive them of any land. The survey of 1928 is valid and in no way voidable.

None of the cases cited by the appellant is inconsistent with the conclusion reached. Thus, in *Lindsey v. Hawes*, 2 Black (67 U. S.) 554 (1862), it was held that if a patent is issued on the basis of an authorized Government survey, the Government is bound by that survey and cannot set aside the sale because a subsequent survey fixes different limits for the tract. There were no inconsistent surveys in the present case. Rather, the land surveyed in 1928 had not been included in either the Hall or Reilly survey, but had constituted a hiatus. The statement in *Mackay v. Easton*, 19 Wall. (86 U. S.) 619 (1873), quoted by the appellant (p. 634), that "a defect in a survey is cured by the issue of a patent thereon," has no relevance because here no question is presented as to any defect in a survey.

The decision of the Assistant Commissioner of the General Land Office was correct and is affirmed.

The appellant is not precluded from either purchasing the timber on the land from the Forest Service, Department of Agriculture, or from initiating proceedings in that Department for an exchange under the act of March 20, 1922 (42 Stat. 465; 16 U. S. C. sec. 485).

OSCAR L. CHAPMAN,  
*Acting Secretary.*

<sup>1</sup>There is no rule concerning Government patents which requires that consecutively numbered ranges must have a common boundary. See, generally, *Platt v. Vermillion*, 99 Fed. 356, 367, 369 (C. C. A. 5th, 1900).

**JOHN A. MARTIN AND GROVER C. LESSARD****A-24121***Decided June 18, 1946***Taylor Grazing Act—Section 15 Grazing Leases—Preference Rights Based on 10-Year National Forest Grazing Permits—"Lawful Occupant of Contiguous Lands."**

The holder of a 10-year national forest permit on contiguous lands is a "lawful occupant of contiguous lands" under section 15 of the Taylor Grazing Act and is accordingly entitled to a preference right to a section 15 grazing lease. Previous contrary decisions overruled.

**Grazing Leases—Priority Among Preference Applicants.**

Except for the provision in section 15 of the Taylor Grazing Act that the preference right shall be only "to the extent necessary to permit proper use of such contiguous lands," there is no distinction in preference between applicants for more than 760 acres where each applicant has contiguous lands. Each such applicant is on a par with the other, unaffected by the extent of contiguity, and the extent to which a lease will be granted as between such applicants is a matter to be determined by the Department in the light of other pertinent factors.

**Renewal of Grazing Leases.**

The preference right to renewal contained in a grazing lease is one of the authorized "terms and conditions as the Secretary may prescribe" under section 15 of the Taylor Grazing Act and constitutes a contractual preference right superior to any preference right which a new applicant could assert.

**Grazing Leases—Effect of Transmittal to Applicant of Lease Forms for Signature.**

The transmittal of a lease form for signature by the applicant does not, upon signature of the lease form by the applicant, immediately operate to prevent the Secretary from exercising his discretion to give final approval or disapproval to the issuance of the lease, irrespective of the preliminary negotiations.

**APPEAL FROM THE GENERAL LAND OFFICE**

John A. Martin, applicant under Phoenix 080427, has appealed from a decision of the Commissioner of the General Land Office dated March 7, 1945. By that decision the Commissioner modified his previous decision of October 9, 1942, which had offered Martin a grazing lease for, among other lands, the W $\frac{1}{2}$  sec. 28, T. 12 N., R. 1 E., G. & S. R. M., Arizona. The Commissioner's decision of March 7, 1945, offers a 10-year renewal lease of the land to Grover C. Lessard, applicant and previous lessee under Phoenix 078307.

The elimination of this tract from the offer to Martin and its award to Lessard were on the ground that the tract was "more necessary to Lessard in order to permit him to make proper use of his privately controlled lands than to Martin."

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The record indicates the following: Both applicants have for many years been in the stock-raising business. Since 1917 Lessard has had all-year-grazing permit allotments on the adjoining Prescott National Forest and his predecessor, his father, had like allotment since 1908. The W $\frac{1}{2}$  sec. 28 adjoins his forest permit lands on the east. The patented homestead and ranch headquarters of Lessard in secs. 33 and 34, same township, adjoin his forest permit lands on the north. On July 16, 1938, the tract here involved was included in a 2-year lease to Lessard. This lease was renewed on July 16, 1940, for 2 more years, there being no rival applicants. Before the expiration of Lessard's renewed lease, Martin filed his application, on May 5, 1942, to lease the W $\frac{1}{2}$  sec. 28, claiming control of all the lands on the north, east, and south sides thereof. Martin states that the land adjoining on the north and east sides of the tract is held under leases expiring in 1954 from the State of Arizona to the estate of his deceased wife, and that the adjoining land on the south is in a similar lease from the State to Martin, expiring in 1952.

Section 15 of the Taylor Grazing Act (act of June 28, 1934, 48 Stat. 1269, 1275, as amended by act of June 26, 1936, 49 Stat. 1976, 1978; 43 U. S. C. sec. 315m) grants to owners, homesteaders, "lessees, or other lawful occupants of contiguous lands" a preference right to a lease "to the extent necessary to permit proper use of such contiguous lands." Par. 4, Circ. 1401, April 30, 1937 (43 CFR 160.6). Lessard claims preference recognition on the ground that he is the lawful occupant of contiguous national forest lands under a 10-year permit. Martin claims preference recognition on the basis of his control of contiguous lands under State leases. This is not the case where a mere seasonal permit is sought to be used as the basis for a preference right to a section 15 lease. Lessard's 10-year national forest permit, although not quite the equivalent of a lease,<sup>1</sup> is clearly sufficient to constitute Lessard a "lawful occupant of contiguous lands." Congress must have meant to include other types of occupancy in addition to those based on ownership, homestead or lease; and to restrict the preference right to those alone would render meaningless the congressional grant of such preference to "other lawful occupants of contiguous lands." A 10-year national forest permit furnishes at least as much stability to grazing operations as any other type of occupancy tenure for such period. There is no readily apparent reason for granting a preference right to a holder of grazing privileges under a State lease while withholding such preference right from a holder of grazing privileges under a 10-year national forest permit. The fact that

<sup>1</sup> Cf. *Osborne v. United States*, 145 F. (2d) 892 (C. C. A. 9th, 1944), denying compensation for a forest permit upon condemnation by the United States War Department. And cf. 56 I. D. 79.

section 15 of the Taylor Grazing Act mentions "lessees" but does not mention "national forest permittees" does not render the holder of the latter type of occupancy any less of a "lawful occupant" within the meaning of section 15 than is a lessee or "other lawful occupant." This Department is unable to see any reason for not according to such lawful occupancy of lands contiguous to the lands applied for the preference rights granted by section 15 to "lawful occupants of contiguous lands." The following and any other similar rulings are therefore overruled to the extent that they are in conflict with this decision on the question whether 10-year national forest permits are proper bases for a preference right under section 15 of the Taylor Grazing Act: *Harold E. Kilner et al.*, A. 21845 (Billings 037146, etc.), February 1, 1939; *Josephine Taylor et al.*, A. 21994 (Phoenix 077753, etc.), June 27, 1939; *Yulu S. Clark et al.*, A. 22852 (Phoenix 079682, etc.), February 20, 1941; *W. C. Condict et al.*, A. 23366 (Cheyenne 063623, etc.), June 24, 1942 (all unreported).

Neither section 15 of the Taylor Grazing Act nor the regulations thereunder establish priority in preference rights in proportion to the amount of respective base lands contiguous to the lands in controversy, and except for the provision that the preference right shall be only "to the extent necessary to permit proper use of such contiguous lands," there is no distinction in preferences between applicants for more than 760 acres where each applicant has contiguous lands. Even though the controlled lands offered by one party as basis for the preference right may have a greater area of contiguity than the controlled lands offered by the other party as a basis for a preference right, all parties having contiguous lands have equal preference rights to lease a particular tract to the extent necessary to permit the proper use of their contiguous lands. Preference is secured upon a showing that the applicants control contiguous lands, the proper use of which requires access to grazing upon the lands applied for. Hence the claims of Lessard and Martin to preference rights on the basis of contiguous lands are on an equal plane, leaving the award of the lease a matter to be determined by the Department in the light of other pertinent factors.

One of the purposes of the Taylor Grazing Act is the maintenance of the stability and security of existing livestock operations. In this case the Lessards have been using forest range practically ever since the Prescott National Forest was established, that is, since 1908. The Lessards have been operating under a 10-year permit recently renewed for the period 1945 to 1955, inclusive. They are the owners of commensurate ranch property and would have every reason to expect

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further renewal of their 10-year-term permit. Loss of these grazing privileges would have the probable effect of forcing Lessard to abandon his ranch as a source of livelihood. No such result would occur to Martin. In such circumstances, in the interest of the permanency of the Lessard operation and its stability as a unit in the livestock industry, the Department believes that the Commissioner was correct in offering the renewal of the lease to Lessard on the basis that the lands were "more necessary to Lessard \* \* \* than to Martin."

But there is an additional and compelling reason for affirming the Commissioner's decision. Lessard's lease of July 16, 1940, provided that "if at the end of said period [of 2 years] the Secretary of the Interior shall determine that a new lease should be granted, the lessee herein shall be accorded a preference right thereto upon such terms and for such duration as may be fixed by the lessor." By that provision the Department entered into a contract with Lessard granting the lessee a preference right to any new lease and therefore, if any new lease is to be granted, Lessard by contract has a preference right thereto. *W. C. Condict et al.*, A. 23366 (Cheyenne 063623, etc.), June 24, 1942 (unreported). Lessard's right to such preference is superior to any preference right which Martin could assert at this time on the basis of ownership or control of contiguous lands. Lessard's lease of July 16, 1940, was made prior to the time that Martin could assert any preference rights on the basis of occupancy of contiguous lands. Section 15 of the Taylor Grazing Act authorized the lease of the lands to Lessard for grazing purposes "upon such terms and conditions as the Secretary may prescribe." One of the terms and conditions prescribed by the Secretary in Lessard's lease of July 16, 1940, was the contractual preference right quoted above, and this provision was within the authority granted to the Secretary. *W. C. Condict et al.*, *supra*. In view of the preference right which Lessard now by contract has to a new lease, his lease should be renewed, but the renewal lease form to be executed by Lessard will provide that the renewal lease "will not afford the lessee a preference right to a further renewal, unless it is shown at the expiration hereof that the lessee is entitled to such a preference under section 15 of the act."

The decision of the General Land Office rejecting Martin's application for a lease is therefore affirmed. The fact that the Commissioner had offered a 5-year lease to Martin by the decision of October 9, 1942, and the fact that the lease forms had been signed by Martin would not prevent revocation of the W $\frac{1}{2}$  sec. 28 and the resulting modification of the lease terms prior to the actual award of the lease, since

there is no binding lease until it is executed and fully completed by the Government.<sup>2</sup> Affirmed.

OSCAR L. CHAPMAN,  
*Acting Secretary.*

# THE SWAN COMPANY v. ALFRED AND HAROLD BANZHAF

A-24148

*Decided June 18, 1946*

## Taylor Grazing Act—Section 15 Grazing Leases—Preference Rights—Contiguous or Cornering Landholders—Equal Preference Rights.

Under section 15 of the Taylor Grazing Act, only *contiguous* landholders have preference rights to secure grazing leases where the tracts to be leased are more than 760 acres in extent; *contiguous* or *cornering* landholders have preference rights to secure grazing leases for isolated or disconnected tracts embracing 760 acres or less. In the latter instance, the preference rights of contiguous and cornering landholders are on an equal plane, unaffected by the extent of contiguity. As between preference applicants on equal preference levels, the extent to which a lease will be granted is a matter to be determined by the Department in the light of other pertinent facts.

## Even-Numbered Sections Within Limits of Railroad Grants—Isolated or Disconnected Tracts Under Section 15 of Taylor Grazing Act.

The even-numbered sections of public lands within the limits of railroad grants are "isolated or disconnected tracts" within the meaning of section 15 of the Taylor Grazing Act. The inclusion in section 15 of a preference for cornering landholders to secure grazing leases on isolated or disconnected tracts was intended to give the holders of even-numbered tracts the same opportunity to secure grazing leases as was accorded to the holders of the odd-numbered section lands.

## Grazing Leases—Subleasing or Assignment—Pasturing Other People's Stock.

The leased grazing lands are for the primary use of the lessee's stock rather than someone else's stock. The leased lands are not to be used for engaging principally in a pasturing business other than the lessee's own livestock operations. Any pasturing of other people's stock, exceeding the incidental, must first have the approval of the Commissioner of the General Land Office, in the absence of which the area leased may be reduced to the extent that it is excessive for the number of the lessee's stock.

## Grazing Leases—Preference Applicants—Adjustment of Disputes by Mutual Agreement.

The Department favors the settlement of grazing disputes between applicants for grazing leases by mutual neighborly agreement for equitable and reasonable allocation of the grazing range in the light of proper grazing practices.

<sup>2</sup> *Transport Oil Co. et al.*, 57 I. D. 520, 525, 529 (1942); *Flor v. United States*, 9 Wall. (76 U. S.) 45 (1869); *Darragh v. United States*, 33 Ct. Cl. 377 (1898); *Monroe v. United States*, 184 U. S. 524 (1902); 14 Comp. Gen. 170, 174 (1934); *United States ex rel. Johnson v. Payne*, 253 U. S. 209 (1920); *Kirk v. Olson*, 245 U. S. 225, 228 (1917); *Wilbur v. United States ex rel. Kadrie*, 281 U. S. 206, 216-217 (1930); *United States ex rel. Knight v. Lane*, 228 U. S. 6, 11, 13 (1913); *New Orleans v. Paine*, 147 U. S. 261, 266 (1893).



*June 18, 1946***Grazing Leases—Preference Right to Renewal.**

The preference right to renewal contained in a grazing lease is one of the authorized "terms and conditions as the Secretary may prescribe" under section 15 of the Taylor Grazing Act and constitutes a contractual preference right superior to any preference right which a new applicant could assert. The assignment of the lease containing such contractual preference right transfers that right, as well as the other benefits and obligations under the lease.

**Grazing Leases Based on Preference Right—Cancellation Upon Loss of Control of Base Lands.**

Grazing leases awarded to a preference applicant on the basis of control of cornering or contiguous lands are subject to cancellation to the extent that the lessee loses control of the respective base lands.

**APPEAL FROM THE GENERAL LAND OFFICE**

This case involves the long-sustained effort of Alfred and Harold Banzhaf to wrest from the control of The Swan Company approximately 1,280 acres of Federal land for grazing purposes in secs. 14 and 22, T. 22 N., R. 77 W., 6th P. M., Wyoming.

These lands had been leased, among other lands, to the Diamond Cattle Company on January 4, 1938, under a 5-year grazing lease (Cheyenne 058915-060681).<sup>1</sup> This lease was based on the Diamond Cattle Company's preference rights under section 15 of the Taylor Grazing Act,<sup>2</sup> the Diamond Cattle Company then owning the contiguous land adjoining these sections on all sides.

The Diamond Cattle Company thereafter assigned its lease, as to secs. 14 and 22, to The Swan Company, and the Department approved this assignment on October 27, 1939. These lands were thereafter identified under serial number Cheyenne 064148, of The Swan Company.

Alfred and Harold Banzhaf, having purchased from the Diamond Cattle Company all the contiguous lands adjoining the lands here involved, filed a petition on May 23, 1941, for cancellation of The Swan Company's leases, Cheyenne 063938<sup>3</sup> and Cheyenne 064148, on the ground that the lessee had lost control of the base lands which constituted the foundation of the preference right upon which the lease

<sup>1</sup> Previously, the Diamond Cattle Company had leased these lands from the United States under a 1-year grazing lease. In its application the Diamond Cattle Company alleged that it had used these lands for many years as part of the open range on the public domain.

<sup>2</sup> Act of June 28, 1934 (48 Stat. 1269, 1275), as amended by the act of June 26, 1936 (49 Stat. 1976, 1978; 43 U. S. C. sec. 315m).

<sup>3</sup> Lease, Cheyenne 063938, covered, among other lands, the following lands in the township (T. 22 N., R. 77 W., 6th P. M., Wyoming) here involved: All of sec. 24, and the N $\frac{1}{2}$  and E $\frac{1}{4}$ SE $\frac{1}{4}$  sec. 26.

was granted.<sup>4</sup> The Banzhafs also filed an application (Cheyenne 065672) to have the land leased to them as the owners of the contiguous lands. The Commissioner of the General Land Office, by decision of December 15, 1941, granted the Banzhafs' petition as to sec. 24,<sup>5</sup> but denied their petition with regard to the lands (N $\frac{1}{2}$  and E $\frac{1}{2}$ SE $\frac{1}{4}$ ) in sec. 26 (under Cheyenne 063938), and with regard to secs. 14 and 22 (under Cheyenne 064148), on the ground that The Swan Company still retained the ownership or control of base lands which cornered on the leased lands in secs. 26, 14, and 22. On appeal by the Banzhafs, the Department, on February 23, 1942 (A. 23266), affirmed the Commissioner with respect to the lands in secs. 26 and 14, but directed the cancellation of The Swan Company's lease (Cheyenne 064148) to the extent of sec. 22 if the Board of Land Commissioners of the State of Wyoming should affirm a decision of the State Commissioner of Public Lands who (on expiration of The Swan Company's State lease on sec. 16 which cornered on sec. 22) had awarded a lease on sec. 16 to the Banzhafs.

The Banzhafs thereupon filed a motion for rehearing, indicating that the Diamond Cattle Company, the assignor of The Swan Company, had had its preference rights based on the contiguous lands, not on any cornering lands, and therefore the Department's decision of February 23, 1942 (which affirmed the Commissioner's decision on the ground that The Swan Company had not lost its base lands because it still controlled the cornering lands), was in error.

By decision of June 4, 1942, on the motion for rehearing, the Department recognized that it had erred, but ruled that although The Swan Company had not retained the control of the contiguous lands offered as base for the leased lands, nevertheless since The Swan Company had control of cornering lands, they would be on the same plane of statutory preference as the Banzhafs for a new section 15 grazing lease at the expiration of the existing lease. The Department stated, "and while that equality of statutory preference exists, the Department does not feel justified in canceling the existing lease and awarding the land to owners of the contiguous lands, particularly where as here the present lease will expire January 4, 1943, and the question as to which of the contending parties should then be awarded a lease will be open for reconsideration." The motion for rehearing was therefore denied.

Shortly before the expiration of lease, Cheyenne 064148, on January 4, 1943, The Swan Company filed a petition for renewal (on

<sup>4</sup> Subsection (e) of 43 CFR 160.26 provides that a grazing lease may be canceled by the Secretary of the Interior "if a preference right lessee fails to retain ownership or control of the lands tendered as a basis for such preference right."

<sup>5</sup> Sec. 24, pursuant to the Commissioner's decision, was awarded to the Banzhafs under 10-year grazing lease, Cheyenne 065672, on January 30, 1942.

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January 2, 1943), and the Banzhafs again filed an application<sup>6</sup> (on October 16, 1942) for a lease on secs. 14 and 22, here involved. Both also sought the N $\frac{1}{2}$  and E $\frac{1}{2}$ SE $\frac{1}{4}$  sec. 26. By decision of March 24, 1945, the Commissioner of the General Land Office awarded a lease to The Swan Company of the 400 acres in sec. 26 (Cheyenne 063938-E) and awarded to the Banzhafs a lease on secs. 14 and 22. The Banzhafs have not appealed insofar as concerns the 400 acres in sec. 26.<sup>7</sup> The Swan Company, however, has appealed from the denial of its petition for renewal of its lease on secs. 14 and 22. It is this appeal which is here involved.

### 1. THE DEPARTMENT'S DECISION OF FEBRUARY 23, 1942

The Swan Company points out that the Department, in its decision of February 23, 1942 (A. 23266), had held that The Swan Company would be entitled to retain its lease on sec. 22 if the Company secured the lease from the State on the cornering sec. 16. Therefore, it is urged, since the State Board of Land Commissioners and the Supreme Court of the State of Wyoming, in the case of *Banzhaf v. Swan Company*, 60 Wyo. 201, 148 P. (2d) 225 (1944), had both ruled in favor of The Swan Company in connection with the leasing of sec. 16 by the State, The Swan Company is entitled to a lease under the Department's previous decision.

The situation before the Department in 1942 was this: The Swan Company, holding a grazing lease for secs. 14 and 22, did not control the contiguous lands upon the basis of which its lease had been issued, but the Company did have control of land in secs. 10 and 12, both of which corner upon sec. 14. In addition, the Company was an applicant for the renewal of its State lease on sec. 16, which corners on sec. 22. The State Commissioner of Public Lands had denied the Company's application and had awarded sec. 16 to the Banzhafs. By virtue of the State procedure for appeal to the Board of Land Commissioners of the State of Wyoming, the decision of the State Commissioner of Public Lands was then not yet final. Therefore, on the assumption that the Company's lease had been granted on the basis of cornering as well as contiguous lands, the Department's decision of February 23, 1942, held that the Company had not lost the preference right upon which the lease was based; but if the Banzhafs should show that the State of Wyoming had finally denied The Swan

<sup>6</sup> See supplemental application 065672.

<sup>7</sup> The Commissioner has not yet executed The Swan Company lease for the lands in sec. 26, presumably to await the outcome of the appeal with respect to secs. 14 and 22. The lands in sec. 26 are in connection with lease, Cheyenne 063938, and were not involved in the dispute with respect to secs. 14 and 22.

Company a lease to sec. 16, the Company's lease would be canceled by this Department as to sec. 22. The Department's decision of February 23, 1942, was on the Banzhafs' petition for the cancellation of the Swan lease. It did not determine, nor was it concerned with, the relative rights of the parties in connection with applications for a new lease. In fact, the Department was quite meticulous and explicit on this point. In the decision of February 23, 1942, it was stated:

In this appeal the Department is concerned only with the question whether sufficient legal basis exists for the cancellation of the Swan Company leases as to the lands remaining intact in its leases. The arguments in the brief as to the applicable principles and the policy that should govern in the determination of the award of unleased land between rival applicants is not germane and will be disregarded \* \* \*.

Therefore, the Department's decision of February 23, 1942, does not compel the award of a new lease on secs. 14 and 22 to The Swan Company solely because the Board of Land Commissioners and the Supreme Court of Wyoming ruled in favor of The Swan Company with respect to sec. 16.

## 2. PREFERENCE RIGHTS FOR APPLICANTS CONTROLLING CONTIGUOUS OR CORNERING LANDS.

The Swan Company then contends that the decision of the Commissioner of the General Land Office conflicts with the Department's action in the following cases, in which The Swan Company, the holder of contiguous lands in each case, was denied grazing leases in favor of other applicants controlling only cornering lands:

Cheyenne 059000—W. E. Dover.

Cheyenne 060673—G. B. Dodge.

Cheyenne 058649—Sidney Sturgeon.

Cheyenne 062275—Ray H. Thompson.

Cheyenne 058391—F. and I. Dobson.

Cheyenne 059529—Don Crerar.

The Company argues that these cases therefore constitute departmental interpretation, at least with respect to the Cheyenne land district; that an applicant controlling cornering lands may have preference rights superior to those of an applicant controlling contiguous lands; and since The Swan Company in this case is the applicant controlling cornering lands, it should be preferred over the holder of contiguous lands. Otherwise, urges the Company, all the previous decisions should be vacated, the leases canceled, and the lands therein involved awarded to The Swan Company.

Section 15 of the Taylor Grazing Act, as amended in 1936, provides as follows:

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Sec. 15. The Secretary of the Interior is further authorized, in his discretion, where vacant, unappropriated, and unreserved lands of the public domain are so situated as not to justify their inclusion in any grazing district to be established pursuant to this Act, to lease any such lands for grazing purposes, upon such terms and conditions as the Secretary may prescribe: *Provided*, That preference shall be given to owners, homesteaders, lessees, or other lawful occupants of contiguous lands to the extent necessary to permit proper use of such contiguous lands, except, that when such isolated or disconnected tracts embrace seven hundred and sixty acres or less, the owners, homesteaders, lessees, or other lawful occupants of lands contiguous thereto or cornering thereon shall have a preference right to lease the whole of such tract, during a period of ninety days after such tract is offered for lease, upon the terms and conditions prescribed by the Secretary.

Section 15 thus sets up two situations in which "owners, homesteaders, lessees, or other lawful occupants" of lands may secure a preference to a grazing lease—

(a) Where the tracts to be leased are more than 760 acres in extent, applicants can secure preference to a grazing lease only on the basis of control of contiguous lands. In such case, the control of cornering lands does not constitute a proper basis for a preference right.<sup>8</sup>

(b) Where the tracts to be leased are "isolated or disconnected tracts" which "embrace seven hundred and sixty acres or less," applicants can secure preference to a grazing lease on the basis of control of either *contiguous* or *cornering* lands.<sup>9</sup>

Neither section 15 of the Taylor Grazing Act, nor the regulations thereunder, establish priority in preference rights in proportion to the amount of respective base lands contiguous to, or cornering upon, the lands in controversy, in either of the respective situations outlined above. Except for the provision that the preference right shall be only "to the extent necessary to permit proper use of such contiguous lands," there is no distinction in degree of preference between applicants for more than 760 acres where each applicant has contiguous lands. Nor is there any distinction in degree of preference between cornering or contiguous landholders who are applicants for 760 acres or less of isolated or disconnected tracts. And even though the controlled land specified by one party as the basis for the preference right may have a greater area of contiguity than the controlled lands specified by the other party as the basis for a preference right, all parties having control of the type of base property specified by the act have equal preference rights to lease a particular tract, either "to the extent necessary to permit proper use of such contiguous

<sup>8</sup> H. Glendon Culverwell, A. 24076 (Denver 052439, etc.), March 7, 1946 (unreported).

<sup>9</sup> Cornering lands are lands which touch only at a point; contiguous lands are lands which have adjoining sides. H. Glendon Culverwell, A. 24076 (Denver 052439, etc.), March 7, 1946 (unreported), and cases therein cited.

lands," or to "the whole of such tract," respectively.<sup>10</sup> They are on an equal plane of legal preference.

Bearing these principles in mind, we now turn to the facts of this case. The lands here involved lie within the limits of the land grant to the Union Pacific Railroad Company.<sup>11</sup> Each alternate section of land having passed under the granting act, the predominant land pattern in this area resembles a checkerboard. Each odd-numbered section generally is owned by the railroad or the title to that land is derived through the railroad; and the even-numbered sections are either public lands, or the title thereto stems from patents to homesteaders or under the school-land grants, etc. If contiguity alone were the basis of preference rights to grazing leases, practically all the grazing leases in the areas of the railroad grants would go to those, generally the larger cattle companies, who have acquired their contiguous lands from the railroad. Few, if any, homesteaders or lessees of school lands in the areas of the railroad grants would have lands contiguous to the remaining public domain lands.

When the Taylor Grazing Act was first enacted in 1934, section 15 permitted the leasing of land only to "owners of lands contiguous thereto." The distinction between the leasing of areas of more than 760 acres (where contiguity is the controlling factor for a preference right) and the leasing of "isolated or disconnected tracts \* \* \* seven hundred and sixty acres or less" (where preference rights may be secured on the basis of either contiguous or cornering lands) was injected into the law when section 15 of the Taylor Grazing Act was amended in 1936. The legislative history of the amendments plainly indicates that Congress was well aware of the fact that the 1934 language of section 15 operated to grant the grazing leases in areas of railroad grants predominantly to those claiming under the railroads. Within a year after the passage of the Taylor Grazing Act on June 28, 1934, Congress had already become engrossed with bills to amend the act. One of these bills was H. R. 3019, Seventy-fourth Congress. Originally a bill approved by this Department, it was so grievously amended that the President vetoed it when it was presented to him for signature. Accompanying his veto message to the Congress,<sup>12</sup> the President transmitted a memorandum of August 26, 1935, by the Secretary of the Interior to the President outlining the various defects in the bill. In addition to a proposed amendment to section 15 designed to authorize the lease of grazing lands to non-

<sup>10</sup> *Stover v. Analla*, A. 22115 (Las Cruces 053907), June 29, 1940; *Wallace v. Clavel*, A. 22091 (Santa Fe 074492), June 22, 1940; *Raymond and Gingery*, A. 21993 (Phoenix 078465), September 1, 1939 (all unreported).

<sup>11</sup> Act of July 1, 1862 (12 Stat. 489); as amended by the act of July 2, 1864 (13 Stat. 356).

<sup>12</sup> H. Jour., p. 1271, and S. Jour., p. 743, both 74th Cong., 1st sess. (1935).

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contiguous landholders,<sup>13</sup> the proposed bill, H. R. 3019, contained a provision (sec. 18) which would automatically have granted to the States all "isolated or disconnected tracts of seven hundred and sixty acres or less," unless included within a grazing district before the end of 2 years. In his memorandum to the President, transmitted to the Congress with the veto message, the Secretary of the Interior, in objecting to this feature of the bill, stated as follows:

The "isolated tract" and the "leasing" clauses have a special significance in railroad land grant areas. In one State there is a strip of land over 300 miles long and 40 miles wide in which the odd-numbered sections, consisting in total of one-half of the area, were long ago granted to the railroad. The even-numbered sections, comprising in the aggregate several millions of acres, are "isolated or disconnected tracts" which, unless appropriated or reserved, could automatically pass into State ownership under the proposed law.

The amendatory act also provides that occupants of lands contiguous to isolated or disconnected tracts shall be entitled to lease them. The language is mandatory. Consider the effect in an area such as that in which odd-numbered sections have been granted to a railroad and even-numbered sections remain largely in public ownership. These public lands are all in the category of "isolated and disconnected tracts," while the contiguous sections are railroad lands. It is common knowledge that vast areas of these railroad lands have been sold or leased to large and powerful stock-raising interests. Under the terms of the act under consideration the occupant of the railroad lands and no one else would be entitled to lease the intervening even-numbered sections. Thus this provision patently would operate for the benefit of the large holder.

The small stockman who has taken a stock-raising homestead on an even-numbered section in such a region would find himself in a sad plight for the reason that no homestead is contiguous to checkerboarded public lands. He would be deprived of all right or opportunity to acquire by lease or otherwise any other even-numbered section in the region. It is the wise intent of the grazing act of 1934 that, commensurate with proper use, the small owner shall be given at least an equal opportunity with his more powerful neighbor to enjoy the benefits of regulated grazing on the public lands. This will not be possible if this act becomes law.

After the President's veto of H. R. 3019, the Congress passed H. R. 10094, Seventy-fourth Congress, which became the amendments of 1936 to the Taylor Grazing Act. The latter bill was based largely on H. R. 3019, but omitting the objectionable features thereof.<sup>14</sup> It is plain that when Congress amended section 15 of the Taylor Grazing Act, by requiring contiguity as a basis for preference to 761 or more acres instead of 640 or more acres, and by granting preferences to contiguous or cornering landholders for "isolated or disconnected tracts \* \* \* seven hundred and sixty acres or less," Congress was mindful of the interpretation placed by the Secretary of the Interior on the

<sup>13</sup> See H. Rept. 479, March 25, 1935, 74th Cong., 1st sess.

<sup>14</sup> S. Rept. 2371, June 15, 1936, 74th Cong., 2d sess.

words "isolated or disconnected tracts." And this Department has so construed the purpose of this provision.<sup>15</sup>

Accordingly, even though the acreage to be leased is here more than 760 acres in the aggregate (two sections of land aggregating about 1,280 acres), this Department holds that the even-numbered sections within the limits of railroad grant lands are "isolated or disconnected tracts \* \* \* seven hundred and sixty acres or less" within the meaning of section 15 of the Taylor Grazing Act, as amended.<sup>16</sup> To hold otherwise, obviously would defeat the intent of Congress in the 1936 amendment that the holder of even-numbered lands, deriving title under homestead patents or school-land grants, should not be discriminated against in favor of the holder of odd-numbered sections who derives his title under the railroad grant. Grazing-lease applicants for such lands who are cornering landholders are therefore to be regarded as on a par with grazing-lease applicants who are contiguous landholders. And since both are preference applicants, on equal preference levels, the extent to which a lease will be granted to any applicant having such a preference right is a matter to be determined by the Department in the light of other pertinent factors.

None of the cases cited by The Swan Company is contrary to these conclusions.

Cheyenne 059000, *The Swan Company v. Dover*: The Swan Company, deriving title from the Union Pacific Railroad Company, owned all the lands contiguous to a sec. 28, while Dover controlled the school-grant sec. 32 which cornered on sec. 28. The Department held (A. 21404, May 16, 1938) that both parties were on equal preference levels, and, since Dover had a greater need for the land, awarded the lease to Dover.

Cheyenne 060673, *The Swan Company v. Dodge et al.*: The Department's decision (A. 21514, November 4, 1938) on the conflict between

<sup>15</sup> In *The Swan Company v. Dover*, A. 21404 (Cheyenne 059000), May 16, 1938 (unreported), the Department stated:

"\* \* \* The company appears to own or control practically all of the odd-numbered sections which are railroad-grant lands.

"The Taylor Grazing Act, as amended, provides in section 15 thereof that owners or other lawful occupants of lands cornering upon isolated or disconnected tracts embracing 760 acres or less of public land shall have a preference right to lease the whole of such tract. It appears that such provision is necessary to prevent an owner or holder of nearly all alternate sections from claiming preference for all public lands adjoining his controlled lands."

This statement was quoted with approval in *The Swan Company*, A. 21514 (Cheyenne 058417, 062275, etc.), November 4, 1938 (unreported).

<sup>16</sup> This does not mean that the phrase "isolated or disconnected tracts" has reference only to public lands within the railroad-grant limits. That phrase, applicable to such lands, is also applicable to lands outside the railroad grant limits, if such lands are "isolated or disconnected tracts." Hence, if the lands offered for lease outside the areas of railroad grants are 760 acres or less, cornering as well as contiguous landholders are preference applicants; but if the area offered for lease outside the areas of railroad grants exceeds 760 acres, even if the area in conflict is less than that acreage, contiguity is required as a basis for preference. *H. Glendon Culverwell*, A. 24076 (Denver 052439, etc.), March 7, 1946 (unreported).



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The Swan Company and Dodge was based entirely on a signed agreement between the parties whereby each waived claim to a portion of the lands in controversy.

Cheyenne 058649, *The Swan Company v. Sturgeon*: Here, too, the Department's decision (A. 21514, November 4, 1938) on the conflict between The Swan Company and Sturgeon was based entirely on a signed agreement between the parties whereby each waived claim to a portion of the lands in controversy.

Cheyenne 062275, *Ray H. Thompson*: The Swan Company, deriving title from the Union Pacific Railroad Company, owned all the lands contiguous to a sec. 10, in addition to controlling the cornering sec. 16; Thompson controlled the cornering sec. 2. The Department held (A. 21514, November 4, 1938) that in view of Thompson's urgent need for the land, the case was similar to *The Swan Company-Dover* conflict discussed above, and for that reason awarded the lease to Thompson. However, some 2 years later, after Thompson had lost control of his cornering sec. 2, his lease was canceled (A. 22650, August 6, 1940), and sec. 10 was thereafter leased to The Swan Company.

Cheyenne 058391, *Frank and Irene Dobson*: With respect to a 320-acre tract in a sec. 34 (E $\frac{1}{2}$ ), The Swan Company owned all the contiguous sections, and Dobson and The Swan Company each claimed the ownership of the cornering SW $\frac{1}{4}$  sec. 26. Since Dobson could not feasibly use the land in sec. 34, the Department held (A. 21514, November 4, 1938) that the E $\frac{1}{2}$  sec. 34 should be leased to The Swan Company. With respect to the 320 acres in a sec. 20 (N $\frac{1}{2}$ ) and the land in a sec. 22, The Swan Company agreed that the lease should be given to the Dobsons, but later these lands were assigned by the Dobsons to The Swan Company (Cheyenne 063938-D).

Cheyenne 059529, *Donald Crerar*: The file indicates that there was some conflict between applications of Crerar and The Swan Company sometime in 1937 or 1938, and that the General Land Office awarded some of the land to The Swan Company and some to Crerar. The acreage involved was less than 640 acres, and the reasons on which the leases were based do not clearly appear from the file. No appeal was taken by The Swan Company.

### 3. THE BANZHAFS' PASTURING OF OTHER PEOPLE'S LIVESTOCK FOR HIRE

The Swan Company urges that the Banzhafs are neither qualified to secure a lease on the lands here involved, nor have any need for these lands, because they have engaged in the pasturing of other people's livestock for hire. That the Banzhafs have engaged in this practice is substantiated by reference to the evidence in the court litigation be-

tween the Banzhafs and The Swan Company in which the Banzhafs admitted such practice. The Banzhafs' affidavit of May 26, 1941 (filed in the record of Cheyenne 063938), when they sought to cancel The Swan Company's lease, also contains an admission of this practice. The record does not now indicate whether they are continuing this practice.

Section 2 (c) of the grazing lease provides that the Secretary may "reduce the leased area if it is excessive for the number of stock owned by the lessee"; and both the standard lease form section 3 (j) and the regulations (43 CFR, Cum. Supp., 160.26 (f)) provide for the cancellation of the lease if the lessee assigns or subleases all or any part of the leased area without obtaining the approval of the Commissioner of the General Land Office. These provisions plainly contemplate that the lease is intended for the use of the lessee's stock. It is not intended for the use of someone else's stock, or for engaging principally in a pasturing business other than the lessee's own livestock operation. To be sure, the Department has frequently granted leases to applicants who had not at the time had any livestock to graze but who supplied reasonable assurance that they would acquire such livestock and use the land for grazing their stock. But, essentially, the applicant must give reasonable assurance that he has in good faith the intent, the expectation, and the financial resources to stock his range and use the land for the purpose of grazing his stock. He may not seek the lease merely to have a greater area with which to produce income derived from other parties, either by way of using the land principally for pasturing other people's livestock or by actually subletting the land.<sup>17</sup> This, of course, does not mean that any instance of pasturing other people's livestock necessarily must result in the denial or cancellation of the lease, nor does it affect leases where the livestock has been pledged as security for a loan; but the practice of pasturing other people's stock may not exceed the incidental.<sup>18</sup> Where such practice is beyond the incidental and is, therefore, tantamount to a subletting, it must first have the approval of the Commissioner of the General Land Office in the particular instance (43 CFR, Cum. Supp., 160.26 (f)).

In view of the allegations made by The Swan Company and their substantiation in the existing record, the Commissioner should ascertain whether the Banzhafs are now engaging in this practice on public lands leased to them, and, if they are, should proceed to reduce the

<sup>17</sup> See *The Swan Company v. Gibbs*, A. 21514 (Cheyenne 058116), June 7, 1939 (unreported).

<sup>18</sup> Cf. Assistant Commissioner Funk's memorandum to the Director, Division of Investigations (Buffalo 033732, I. D., M. 2275), approved by Under Secretary Slattery on May 24, 1939; *The Swan Company v. Gibbs*, A. 21514 (Cheyenne 058116), June 7, 1939 (unreported).

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area leased to the Banzhafs to the extent that it is excessive for the number of stock owned by them.

But since the record does not indicate whether the Banzhafs are now engaged in this practice on the lands leased to them, does not plainly indicate that their application for the lands here involved is motivated by an intention to engage in that practice on these lands; and does not indicate whether the lands here involved would plainly be excessive for the stock owned by them, the Department will not consider this ground as a basis upon which to rule against the Banzhafs in this case.

#### 4. THE RELATIVE NEED OF THE PARTIES

Secs. 14 and 22 are located  $2\frac{1}{2}$  and  $3\frac{1}{2}$  miles, respectively, south of the Carlin Ranch headquarters of The Swan Company. The SW $\frac{1}{4}$  of sec. 22 is crossed by the Lincoln Highway. During the time of The Swan Company's lease, secs. 14 and 22 were individually fenced, and a livestock water reservoir was constructed in the SW $\frac{1}{4}$  of sec. 22. Sec. 22 is the only land previously controlled by The Swan Company which touches the 480 acres in sec. 26 leased by The Swan Company.<sup>19</sup> Secs. 12, 14, 16, 22, and 26 thus each constitute a connecting link in the chain of lands used by The Swan Company for its grazing operations. The Swan Company states that if sec. 26 were isolated, it would become useless to the Company; its lease, Cheyenne 063938-E, would, in effect, be nullified. The Swan Company also insists that secs. 14, 16, and 22, which are on the south slope of the Como Ridge, are particularly important to its operations as winter pasture and feeding grounds. When all other roads are blocked by snow, feed can be hauled to the Company's livestock on these sections from the nearby Ridge Station of the Union Pacific Railroad by way of the Lincoln Highway. Thus, during severe winter weather, the Company can save the lives of many of its livestock by trailing them onto these sections and feeding them by means of feed hauled from the railroad station. These statements are substantiated by recitals of the evidence to this effect in the court litigation between the Banzhafs and The Swan Company. The Banzhafs, who were served with copies of The Swan Company's notice of appeal and its brief, have not contradicted these statements.

The Banzhafs' contention is that they are entitled to the lease because they control the adjoining sections. They accordingly refused to enter into a compromise agreement, offered by The Swan Company and deemed reasonable and equitable to both parties by the Depart-

<sup>19</sup> Of these lands, 80 acres (W $\frac{1}{2}$ SE $\frac{1}{4}$ ) are under a private lease, and 400 acres (N $\frac{1}{4}$  and E $\frac{1}{2}$ SE $\frac{1}{4}$ ) are under Taylor Grazing lease, Cheyenne 063938-E, noted in footnote 7, *supra*.

ment's field examiner, by which agreement both parties would make certain concessions and would secure corresponding advantages and more effective range management. The record contains statements by the Banzhafs that they need additional lands for their operations, but contains no facts substantiating these statements.

As already shown in part 2 above, both parties are on an equal plane of preference. Under such circumstances, the Department prefers grazing disputes to be settled between the parties by mutual neighborly agreement for an equitable and reasonable allocation of the grazing range in the light of proper range-management practices. In all probability, had such neighborly agreement been made by the parties in this case, the Department would have confirmed it with leases accordingly.<sup>20</sup> But where the parties are unable to come to such agreement and instead choose to submit their disagreements to the administrative process, this Department must render its decision according to the legal rights and equitable considerations of the parties.

In this case it seems plain that The Swan Company has special need for the sections here involved. Without them, its operations may be seriously impeded during severe winters. The Banzhafs rely solely on their asserted superior legal preference and do not deny the special needs of The Swan Company for these sections. Therefore, and since the Banzhafs are not on a preference level superior to that of The Swan Company, it is the view of the Department that The Swan Company has shown equitable considerations sufficient to merit the renewal lease for which it has applied.

##### 5. THE RENEWAL CLAUSE IN THE PREVIOUS LEASE

But even if there were greater room for indecision on this matter, the provisions of The Swan Company's lease require that the Company be granted a renewal lease. The Company's lease of January 4, 1938, contained the following provision:

\* \* \* and if at the end of said period [of five years] the Secretary of the Interior shall determine that a new lease should be granted, the lessee herein will be accorded a preference right thereto upon such terms and for such duration as may be fixed by the lessor.

Section 15 of the Taylor Grazing Act authorized the lease of the lands "upon such terms and conditions as the Secretary may prescribe." One of the terms and conditions prescribed by the Secretary in this lease was the contractual preference right quoted above, and by that provision the Department entered into a contract giving to the lessee a

<sup>20</sup> H. Glendon Culverwell, A. 24076 (Denver 052439), April 12, 1946 (unreported); J. S. and Clara Parsons, 59 I. D. 210 (1946); Hooker and Villareal, A. 24254 (Las Cruces 054640), February 26, 1946 (unreported).

*June 25, 1946*

preference right to any new lease which might be granted on these lands. This preference right is a contractual right under the previous lease. Since the assignment by the Diamond Cattle Company to The Swan Company transferred the preference right to renewal as well as the other benefits and obligations under that lease, The Swan Company's contractual preference right under that provision is, therefore, superior to any preference right which the Banzhafs could assert on the basis of ownership or control of contiguous lands.<sup>21</sup> In view of the Company's status as a preference applicant by virtue of its control of cornering lands and because of the equitable considerations shown by the Company, the duration of the renewal lease will be the regular 10-year term. In accordance with present regulations, however, the renewal lease will not provide the lessee a preference right to a further renewal, unless it is shown at the expiration hereof that the lessee is entitled to such a preference under section 15 of the act.

#### 6. CONCLUSION

Accordingly, the decision of the General Land Office is reversed, and a renewal lease will be issued to The Swan Company for secs. 14 and 22 for a 10-year period effective from January 4, 1943, the date of the expiration of its previous lease. It is understood that one of the grounds upon which this decision is based is the Company's status as a preference applicant under section 15 of the Taylor Grazing Act on the basis of its control of cornering land; and therefore this lease will be subject to cancellation to the extent that the Company loses control of the respective base lands.

OSCAR L. CHAPMAN,  
*Acting Secretary.*

#### INVENTION OF A CONDENSER CARRIER

**Order No. 1763—Circumstances Surrounding Invention—Act of March 3, 1883, as Amended—Act of June 25, 1910, as Amended.**

The duties of a power-shovel operator do not require research or investigation or the supervision of research or investigation.

Reduction to practice by the Government, for its own benefit, of an invention completely conceived and sketched by an employee on his own time, without the use of Government materials or financing, is not a substantial making or development of the invention through the use of Government facilities or

<sup>21</sup> W. C. Condict, A. 23366 (Cheyenne 063623), June 24, 1942; H. Glendon Culverwell, A. 24076 (Denver 052439), April 12, 1946; Estate of D. M. Oberman, A. 24176 (Cheyenne 059430), March 25, 1946; Gerald M. Darrow, A. 24211 (Buffalo 035203), April 12, 1946; Alva Smith, A. 24136 (Spokane 018209), April 12, 1946 (all unreported); J. S. and Clara Parsons, 59 I. D. 210 (1946).

financing, or on Government time, within the meaning of Departmental Order No. 1763 of November 17, 1942.

An employee of the Department of the Interior, not engaged in investigation or research, is not required by Departmental Order No. 1763 of November 17, 1942, to assign to the Government an invention made on his own time, with his own facilities.

The Government is immune from suit for the use of any patented invention made by an employee of the Interior Department, and is prohibited from paying royalties for the use of his invention under the act of June 25, 1910 (36 Stat. 851), as amended by the act of July 1, 1918 (40 Stat. 705; 35 U. S. C. sec. 68).

M-34565

JUNE 25, 1946.

THE SECRETARY OF THE INTERIOR.

MY DEAR MR. SECRETARY: My opinion has been requested concerning the relative rights of the Government and the inventor in a Condenser Carrier invented by Arthur A. Corder, an employee of the Bonneville Power Administration. The Department of Justice has already been requested to prepare a patent application under the act of March 3, 1883, as amended (35 U. S. C. sec. 45), in order to protect the interests both of the Government and of the inventor, since the invention may have been in public use since July 1945.

The Condenser Carrier is a device for use in installing and maintaining horizontally mounted heavy equipment of all kinds, particularly synchronous condensers, motors, and generators. Conception is stated to have occurred in May 1943, but the invention was not disclosed to others until July 1945, when Mr. Corder presented the assistant chief of shop at the J. D. Ross Substation, where he was employed as a power-shovel operator, with a working sketch and full directions for constructing the device. The occasion for the disclosure at that time was the break-down of one of the condensers. A teletype from the Bonneville Power Administration indicates that the working drawings were prepared on the inventor's own time. The device was constructed immediately thereafter in the shops of the substation at Government expense, and put into use at once to overhaul a condenser which had broken down.

As a power-shovel operator, Mr. Corder did not engage in or supervise research or investigation as a part of his assigned duties. If the Government is entitled to an assignment of the invention pursuant to Departmental Order No. 1763 of November 17, 1942, setting forth the relative rights of the Government and employees of the Interior Department in inventions made by them, it is only because it was substantially made or developed through the use of Government facilities or financing, or on Government time, or through the aid of Government information not available to the public. Construction of the

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device cost the Government \$240 for materials and a substantial sum<sup>1</sup> for labor. Reduction to practice was possible only with heavy equipment of the sort used at the substation. Mr. Corder could not reasonably have been expected to construct the device and reduce it to practice at his own expense before a determination of his rights therein. His preparation of working sketches and a description evidencing complete conception on his own time is as much as he could have been expected to do. Had he made an invention report and requested a determination of his rights at that time, Government facilities, time, and financing would have been in no way involved. Instead, realizing that the use of his invention by the Bonneville Power Administration would simplify the job of repairing equipment, he permitted the Government to construct and operate a device made according to his specifications. He should not be penalized for his action by a requirement that he assign his invention to the Government. Reduction to practice by the Government, for its own benefit, of a completely conceived invention made and sketched by one of its employees on his own time, without the use of Government facilities or financing, is not such a substantial making or development of an invention through the use of Government facilities or financing, or on Government time, as to require an assignment under Departmental Order No. 1763.

Mr. Corder indicates in his invention report that he wishes the Bonneville Power Administration to have the right to manufacture and use the Condenser Carrier, but desires to retain all other rights therein. It must be pointed out, however, that the entire Government has, in effect, a license to manufacture and use the device derived from the act of June 25, 1910 (36 Stat. 851), as amended by the act of July 1, 1918 (40 Stat. 705; 35 U. S. C. sec. 68).

That act, which opens the Court of Claims to suits for the unlicensed use of patented inventions by or for the United States, contains the following language:

\* \* \* the benefits of this Act shall not inure to any patentee who, when he makes such claim, is in the employment or service of the Government of the United States, or the assignee of any such patentee; *nor shall this Act apply to any device discovered or invented by such employee during the time of his employment or service.* [Italics supplied.]

The Comptroller General has interpreted this language as prohibiting not only suits by employees against the United States for the unauthorized use of their inventions, but also payments of royalties to such employees for the use of their patented inventions, even pursuant to contracts requiring the use of such devices (A-56442, November 20,

<sup>1</sup> Since the labor cost of \$2,760 on the work order included other items, it is impossible to allocate the exact costs attributable to labor, but they apparently amounted to at least several hundred dollars.

1934, 14 Comp. Gen. 396). Since the Government is prohibited from making payments for the use of such inventions, and cannot be enjoined from using them, it has, for all practical purposes, a royalty-free license.

Thus, whether or not Mr. Corder chooses to have his patent application prosecuted under the act of March 3, 1883, as amended, *supra*, the Government may manufacture or use the invention for governmental purposes without the payment of royalties. Inasmuch as the Department of Justice has already begun the preparation of a patent application, and it is apparently necessary that the application be filed sometime in July, it will be assumed that Mr. Corder wishes to continue the prosecution under the act of 1883 unless he notifies me to the contrary.

FELIX S. COHEN,  
*Acting Solicitor.*

### RAY SORRELL

A-24341

*Decided July 9, 1946*

#### Oil and Gas Leases—Partial Assignment—Effect of Discovery on Segregated Land.

The assignment of an oil and gas lease as to part of the land included in the lease creates a separate and independent lease as to that portion of land, and a discovery on either the retained or assigned portion does not inure to the benefit of the other portion.

#### Oil and Gas Leases—Assignments—Subleases.

An instrument which simply recites that the lease owner "bargains, sells, transfers, assigns and conveys all of his right, title and interest in and to said lease" is an assignment and not a sublease; and the lease owner, after approval of the assignment, cannot be heard to say that by a separate agreement, not submitted to the Department, it was intended by the parties that the instrument was to be a sublease.

#### MOTION FOR REHEARING

On December 31, 1938, oil and gas exchange lease, Great Falls 080389, was issued to Ray Sorrell for a 5-year term. The lease embraced the SE $\frac{1}{4}$  sec. 7, and the N $\frac{1}{2}$ NE $\frac{1}{4}$ , N $\frac{1}{2}$ SE $\frac{1}{4}$  sec. 18, T. 35 N., R. 3 W., P. M., Montana, 320 acres. On October 15, 1940, the Department approved an assignment by Sorrell to the Rim Rock Producing Company of the S $\frac{1}{2}$ SE $\frac{1}{4}$  sec. 7, and the N $\frac{1}{2}$ NE $\frac{1}{4}$  sec. 18, 160 acres, and gave serial number 083944 to the part of the lease assigned. A discovery of oil was made on April 9, 1942, in the NW $\frac{1}{4}$ SE $\frac{1}{4}$  sec. 18, part of the land retained by Sorrell, but the Geological Survey reported on August 29, 1944, that the geologic evidence did not warrant



*July 9, 1946*

the conclusion that any of the lands assigned were to be considered as being within the known geologic structure of any producing oil or gas field because of the discovery.

On December 28, 1943, immediately prior to the expiration date of the original 5-year term of lease 080389, Sorrell filed a reassignment to him from Rim Rock Producing Company of the 160 acres embraced in lease 083944. In response to an inquiry as to the status of the assignment, the Department wrote E. J. McCabe, attorney for Sorrell, on September 23, 1944, that since no discovery had been made on lease 083944, the lease terminated on December 31, 1943, and that since no preference-right application for a new lease had been filed, no action was necessary on the assignment. On October 5, 1944, the Department also informed Sorrell by telegram that approval of a partial assignment of an oil and gas lease creates two separate and distinct leases; that a discovery on one will not inure to the benefit of the other for purposes of lease extension; and that consequently the discovery on lease 080389 did not extend the term of lease 083944 which expired December 31, 1943.

Sorrell thereupon filed a petition for reconsideration of the matter. The petition will be considered as a motion for rehearing of the Department's ruling in the letter and telegram.

Sorrell's principal contention is that the assignment from him to Rim Rock Producing Company did not create a separate independent lease and that the discovery on the retained portion therefore inured to the benefit of the assigned tract. He claims that the assignment was in actuality a sublease since he reserved a part of the land and a portion of the term of his original lease and a royalty payable out of future production from the tract assigned. In support of this contention he attaches a copy of an agreement, executed May 7, 1940, between himself and Rim Rock under which he agreed to assign all of his right, title, and interest in the 160 acres in consideration of a cash payment and an additional payment out of production. Rim Rock further agreed to drill a well upon the assigned land but to relinquish all right, title, and interest in the lease if it did not commence such well before 6 months preceding expiration of the lease.

It seems clear from the terms of the agreement that it was an assignment and not a sublease. However, it is unnecessary to discuss the point since this agreement was never submitted to the Department and never received departmental attention, much less approval. The instrument which was submitted to the Department and approved on October 15, 1940, after reciting the issuance of lease 080389 to Sorrell covering the 160 acres, provided simply that—

NOW, THEREFORE, for and in consideration of One Dollar (\$1.00), the receipt of which is hereby acknowledged, Ray Sorrell, the owner of the above

described lease, hereby bargains, sells, transfers, assigns and conveys all of his right, title and interest in and to said lease, insofar as it covers the above described lands, subject to the approval of the Secretary of the Interior, to Rim Rock Producing Company, a corporation of Kevin, Montana, said assignment to be effective from date of approval hereby by the Secretary of the Interior.

There can be no question that this instrument constituted an assignment; in fact it would be difficult to find clearer language which could be used to effect an assignment.

A partial assignment therefore having been made, two separate leases were created. This rule as to the result of a partial assignment has been consistently followed by the Department (Circ. 960 of August 19, 1924, Circulars and Regulations of the General Land Office, 1930, p. 930; 43 CFR, Cum. Supp., 192.41a) and has been held to be valid (*C. W. Grier and George Etz*, May 12, 1944; motion for rehearing denied October 23, 1944; both 58 I. D. 712). Therefore, the discovery on the land retained in lease 080389 did not inure to the benefit of the assigned land in lease 083944 and did not extend the term of the latter lease beyond December 31, 1943. A new preference-right lease could have been applied for upon the basis of lease 083944 under the act of July 29, 1942 (56 Stat. 726; 30 U. S. C. sec. 226b), since the lands covered were not on the expiration date of the lease within the known geologic structure of any producing oil or gas field, but since no application was filed within the period required by that act, this course of action for extending the life of the lease cannot now be availed of by Sorrell. Lease 083944 must be held to have expired on December 31, 1943.

The motion for rehearing is denied.

C. GIRARD DAVIDSON,  
*Assistant Secretary.*

## RECLAMATION WITHDRAWAL OF SURVEYED ARIZONA SCHOOL LANDS

### Reclamation Withdrawal—Arizona School Lands.

Sections 16 and 36 lands reserved for school purposes to the State of Arizona remained subject to a reclamation withdrawal under section 3 of the act of June 17, 1902 (32 Stat. 388; 43 U. S. C. sec. 416), even after survey.

The act of April 7, 1896 (29 Stat. 90), which granted authority to the Territory of Arizona to lease the lands reserved for school purposes, is not inconsistent with an interpretation of section 3 of the Reclamation Act of June 17, 1902 (32 Stat. 388; 43 U. S. C. sec. 416), permitting a reclamation withdrawal of surveyed lands reserved for school purposes.

### School Lands.

A congressional reservation of lands for school purposes to a future State is not a grant of such lands, and title remains in the United States, subject

July 16, 1946

to the full control and disposition of Congress, until the contemplated grant is effected.

### Arizona School Lands.

There was no granting act involving Arizona school lands until its admission to statehood on February 14, 1912 (37 Stat. 1728).

### Reclamation Withdrawal—School Lands.

It is admitted that unsurveyed lands reserved for school purposes to a future State remained subject to a reclamation withdrawal under the act of June 17, 1902 (32 Stat. 388; 43 U. S. C. sec. 416).

### Reclamation Withdrawal—Forest Reserve.

Lands included in a forest reserve remain subject to a reclamation withdrawal although they are severed from the public domain and public entry on them is precluded.

### Arizona Enabling Act—School Lands—Reclamation Withdrawal.

The Arizona Enabling Act of June 20, 1910 (36 Stat. 557), making specific provision for lieu selections if school sections were otherwise reserved, confirms the interpretation of section 3 of the Reclamation Act of June 17, 1902 (32 Stat. 388; 43 U. S. C. sec. 416), that lands reserved for school purposes remained subject to a reclamation withdrawal even after survey.

M-33540

JULY 16, 1946.

### TO THE COMMISSIONER OF THE GENERAL LAND OFFICE.

The State of Arizona, through the Commissioner of its Land Department, has asked the Department to reconsider the question whether the State has title to certain sections 16 and 36 in surveyed townships within its borders.

By the act of September 9, 1850 (9 Stat. 446), the boundaries of the Territory of New Mexico were defined and a temporary government established. Under the provisions of that act and of the act of July 22, 1854 (10 Stat. 308), the sections numbered 16 and 36 within the Territory were reserved for the maintenance of schools therein and in the States and Territories to be created therefrom.<sup>1</sup> By the act of February 24, 1863 (12 Stat. 664), a portion of the Territory of New Mexico was set apart as the Territory of Arizona and sections 16 and 36 in the new Territory were reserved to the future State for school purposes (Rev. Stat. sec. 1946). The act of June 21, 1898 (30 Stat. 484), carried into a grant to the Territory of New Mexico the previously reserved school sections.<sup>2</sup> This grant, however, did not affect school sections within the Territory of Arizona because of its earlier separation from the older Territory.<sup>3</sup> There was no granting act involving Arizona school lands until its admission to statehood on Feb-

<sup>1</sup> *New Mexico v. Altman*, 54 I. D. 8 (1932).

<sup>2</sup> *Tillian v. Keepers*, 44 L. D. 460 (1915).

<sup>3</sup> *Cf. Byers v. State of Arizona*, 52 L. D. 488 (1923).

ruary 14, 1912 (37 Stat. 1728), pursuant to the Enabling Act approved June 20, 1910 (36 Stat. 557).

Since its admission to statehood, Arizona has administered surveyed school sections within its borders, selling and making other disposition of them, apparently entertaining no doubt as to the sufficiency of its title. However, by a decision dated September 21, 1933, and approved by the Department, the General Land Office denied the State's claim to sec. 36, T. 16 S., R. 21 E., S. B. M., the survey of which was first approved in 1857, on the ground that this tract had been withdrawn for reclamation purposes by departmental orders dated January 31, 1903, and July 20, 1905, under the authority of the act of June 17, 1902 (32 Stat. 388; 43 U. S. C. sec. 416). Also, by a decision dated November 25, 1935, the General Land Office dismissed a protest filed by the State of Arizona against the allowance of a homestead entry of one L. M. Peterson for a portion of sec. 16, T. 1 N., R. 4 E., G. & S. R. M., survey approved October 21, 1868, on the ground that a reclamation withdrawal of this land by departmental order of July 2, 1902, prevented the vesting of title to the tract in the State and hence the State had no right to be heard in opposition to the application.<sup>4</sup>

While insisting that it owned the lands, the State, on February 21, 1936, requested the Department to restore certain school section lands from reclamation withdrawals for the Salt River and the Yuma irrigation projects. On April 13, 1936, the State filed with the Department an application for patent under the act of June 21, 1934 (48 Stat. 1185; 43 U. S. C. sec. 871a), to a number of school sections in these two irrigation projects. On June 4, 1936, pursuant to a recommendation of the Acting Commissioner of the Bureau of Reclamation, the Department approved the revocation of withdrawals as to certain school sections in the Salt River project; and, in August 1936, similar approval was given to revocations relating to certain school sections in the Yuma project. In 1945, also upon request of the State, reclamation withdrawals were revoked with respect to additional sections 16 and 36 which had been disposed of by the State of Arizona, bringing the total of lands thus restored to over 28,000 acres.

However, the State has now petitioned the Department to reconsider generally the question of the State's title to sections 16 and 36 in surveyed townships, withdrawn at the time of the passage of the Arizona Enabling Act, the title to which had not been disposed of by the State.

<sup>4</sup>The State did not appeal to the Department from this decision. However, Peterson did and the decision was affirmed as to her, on the ground that the land was effectively withdrawn by the reclamation withdrawal. *Lillian M. Peterson et al.*, A. 20411, August 5, 1937 (unreported).

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It appears that the question now presented involves title to probably less than 11,000 acres. In support of its petition the State argues that the sections 16 and 36 reserved for school purposes to the Territory of Arizona, and to the State to be created out of that Territory, were upon survey set apart from the public lands and dedicated to the specific purpose of supporting the common schools; and that by the act of April 7, 1896 (29 Stat. 90), Congress granted to the Territory of Arizona full jurisdiction and control over the lands reserved for school purposes.

It is settled, and not questioned by the petitioner, that a congressional reservation of lands for school purposes to a future State is not a grant of such lands,<sup>5</sup> and that title remains in the United States, subject to the full control and disposition of Congress until the contemplated grant is effected.<sup>6</sup> It is also admitted that unsurveyed lands reserved for school purposes to a future State remained subject to a reclamation withdrawal. *State of Utah*, 53 I. D. 365 (1931); *Joseph C. Bringham et al.*, 50 L. D. 628 (1924). However, petitioner insists that the Reclamation Act did not confer authority on the Secretary of the Interior to withdraw for reclamation purposes surveyed lands so reserved, for the reason that such lands were no longer subject to "entry" and therefore were not within the purview of the Reclamation Act since that act granted only authority to withdraw lands "from entry."

The pertinent portion of section 3 of the Reclamation Act reads as follows:

That the Secretary of the Interior shall, before giving the public notice provided for in section four of this Act, withdraw from public entry the lands required for any irrigation works contemplated under the provisions of this Act, and shall restore to public entry any of the lands so withdrawn when, in his judgment, such lands are not required for the purposes of this Act; and the Secretary of the Interior is hereby authorized, at or immediately prior to the time of beginning the surveys for any contemplated irrigation works, to withdraw from entry, except under the homestead laws, any public lands believed to be susceptible of irrigation from said works: \* \* \*. [32 Stat. 388; 43 U. S. C. sec. 416.]

Consideration of the purposes of the Reclamation Act and of its judicial and administrative interpretation shows that the restrictive construction of the statute urged by the State is unjustified. The Reclamation Act "outlines a comprehensive reclamation scheme" (*Henkel v. United States*, 237 U. S. 43, 49 (1915)), and has consistently been construed to authorize withdrawals of land similar in character to land reserved for school purposes. While the precise issue now

<sup>5</sup> *United States v. Morrison*, 240 U. S. 192 (1916); *Jane Hodgert*, 1 L. D. 632 (1880).

<sup>6</sup> *Thomas E. Watson*, 6 L. D. 71 (1887); cf. *United States v. Morrison*, *supra*; *Wisconsin v. Lane*, 245 U. S. 427 (1918); *Gonzales v. French*, 164 U. S. 338 (1896).

presented apparently was never determined judicially, the practice of broadly interpreting the withdrawal authority of section 3, in a manner inconsistent with the narrow approach here suggested by petitioner, has been approved by the courts and sanctioned by congressional enactment.

For example, lands included in a forest reserve have been subjected to reclamation withdrawals. (See 33 L. D. 389.) The creation of a forest reserve, like the survey of reserved school lands, has the effect of severing the reserved land from the public domain and of precluding "public entry" on the land. *Shannon v. United States*, 160 Fed. 870, 873 (C. C. A. 9th, 1908); *Light v. United States*, 220 U. S. 523 (1911); cf. *Chicago, M. & St. P. Ry. Co. of Idaho v. United States*, 244 U. S. 351 (1917); see, also, 16 U. S. C. sec. 482. But it is nevertheless recognized that forest-reserve lands remain subject to withdrawal under the Reclamation Act. The Attorney General, in ruling that a reclamation withdrawal was effective, specifically recognized that national forest lands "are not open to 'public entry' in the ordinary sense." 30 Op. Atty. Gen. 398, 400, at 402 (1915); cf. *United States v. Hanson*, 167 Fed. 881 (C. C. A. 9th, 1909). Congress has expressly sanctioned the practice of withdrawing for reclamation purposes land covered by other reservations or withdrawals. Thus, the act of July 19, 1919 (41 Stat. 163, 202), provides that proceeds derived from the lease of lands affected by a reclamation withdrawal and "by a reservation or withdrawal under some other law" shall be covered into the reclamation fund. It may be noted also that in the case of *Henkel v. United States*, *supra*, the court referred to the fact that land in an Indian reservation had been withdrawn for reclamation purposes, without questioning the legality of that procedure.<sup>7</sup>

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<sup>7</sup> No light is shed upon the question here involved by the legislative history of the Reclamation Act. No statement appears in the extensive Committee reports that surveyed school lands were to be excluded from the authority to withdraw lands for reclamation purposes; cf., e. g., H. Rept. 794, 57th Cong., 1st sess., March 8, 1902. When a question as to school lands was raised on the floor of the House, the ensuing discussion was entirely inconclusive. (See 35 Cong. Rec. 6735-6736, 57th Cong., 1st sess., June 13, 1902.) True, it appears that Congress took figures from the 1901 Annual Report of the Commissioner of the General Land Office for the charts used in the course of the legislative history of the Reclamation Act (see H. Rept. 794, *supra*, p. 4; 35 Cong. Rec. 6676); and in the Annual Report "the area of lands granted for school purposes" was included in the column of "appropriated lands." (1901 Annual Report, p. 197.) But no conclusion either way can be based on that fact. The argument that therefore school lands reserved but not yet "granted" were considered by Congress to be subject to reclamation withdrawal appears somewhat speculative; it would be even more speculative, however, to reason that the mention of school lands in the Annual Report indicates a congressional intent that such lands generally, whether or not actually granted, were excluded from reclamation withdrawals on the theory that Congress considered subject to withdrawals only the lands listed in the Annual Report as "unappropriated and unreserved." In any event, the latter conclusion would run contrary to the express legislative recognition (act of July 19, 1919, *supra*) and well-established and judicially approved practice (see, *supra*) that lands included in certain reservations are, nevertheless, subject to reclamation withdrawal. (See p. 197 of the Annual Report, stating that the column of "reserved lands" includes "all lands reserved for any purpose whatsoever.")

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This interpretation of section 3 of the Reclamation Act is not, as claimed by the State, inconsistent with the act of April 7, 1896 (29 Stat. 90). That act granted authority to the Territory of Arizona to lease the lands reserved for school purposes, but it provided expressly that "all leases shall terminate on the admission of said Territory as a State," thus evidencing that the Territory was denied power to affect the title to the land (32 L. D. 604, 605). Subject merely to any leases issued by the Territory, the act clearly did not limit the authority of Congress to dispose of the title to the land. There is nothing in the act to indicate that a survey was to have the effect of excluding the land from the operation of a future withdrawal, such as a withdrawal under the Reclamation Act.

On the other hand, the broad interpretation of the Reclamation Act finds strong confirmation in the Arizona Enabling Act of June 20, 1910, *supra*. That act not only reserved generally to the United States all powers for carrying out the provisions of the Reclamation Act (sec. 20, par. 7; 36 Stat. 557, 570), but section 24 demonstrates that in enacting the statute Congress was of the opinion that land such as that here in question was properly subject to a reclamation withdrawal. Section 24 of the Enabling Act, making specific provision for lieu selections if school sections were otherwise reserved, reads, in part, as follows:

That in addition to sections sixteen and thirty-six, heretofore reserved for the Territory of Arizona, sections two and thirty-two in every township in said proposed State not otherwise appropriated at the date of the passage of this Act are hereby granted to the said State for the support of common schools; and where sections two, sixteen, thirty-two, and thirty-six, or any parts thereof, are mineral, or have been sold, *reserved, or otherwise appropriated or reserved by or under the authority of any Act of Congress*, or are wanting or fractional in quantity, or where settlement thereon with a view to preemption or homestead, or improvement thereof with a view to desert-land entry has been made heretofore or hereafter, and before the survey thereof in the field, the provisions of sections twenty-two hundred and seventy-five and twenty-two hundred and seventy-six of the Revised Statutes, and Acts amendatory thereof or supplementary thereto, are hereby made applicable thereto and to the selection of lands in lieu thereof to the same extent as if sections two and thirty-two, as well as sections sixteen and thirty-six, were mentioned therein: \* \* \*. [Italics supplied.]

It is admitted that lands subjected to reclamation withdrawals fall within the italicized portion of section 24, i. e., are lands "reserved, or otherwise appropriated or reserved by or under the authority of any Act of Congress" within the meaning of section 24. *Elizabeth J. Laurence*, 49 L. D. 611 (1923); see, also, *State of Utah*, 53 I. D. 365 (1931); *Joseph C. Bringham et al.*, 50 L. D. 628 (1924). In fact, the State of Arizona has repeatedly made lieu selections under section 24 for land withdrawn for reclamation purposes; cf. *Elizabeth J. Lau-*

rence, *supra*. The State suggests, however, that school lands which were surveyed before the enactment of the Reclamation Act were exempt from withdrawal and, therefore, from the effect of section 24. Both the terms of the statute and the interpretation given to it refute the State's suggestion. Section 24 of the Arizona Enabling Act does contain a reference to surveys by requiring expressly that certain action must have been "before the survey \* \* \* in the field." It is obvious, however, that this qualification relates only to the last group of situations covered by section 24, namely to the cases of settlements on, and improvements of, the land.<sup>8</sup> Clearly, the qualifying clause "before the survey \* \* \* in the field" cannot have any reference to the preceding groups of cases enumerated in section 24, such as mineral lands, lands sold,<sup>9</sup> or fractional in quantity. Consequently, the conclusion is inescapable that, different from the cases of settlements and improvements, the time of the survey was considered by the Congress to be irrelevant with respect to lands "reserved or otherwise appropriated." Moreover, it has been held that certain section 2 lands, although surveyed before the enactment of the Reclamation Act, were subject to reclamation withdrawal, and that section 24 of the Arizona Enabling Act is applicable to such lands. *Elizabeth J. Lawrence, supra*. The Enabling Act, in granting the right to lieu selections for reserved land, thus did not exempt surveyed lands. And considering the unqualified provision of section 24 of the Arizona Enabling Act in this regard, there is clearly no justification for making an exception, as suggested by the State, with respect to school sections 16 and 36.<sup>10</sup>

It is, therefore, concluded that lands reserved for school purposes to the State of Arizona, even after survey, remained subject to a reclamation withdrawal under section 3 of the act of June 17, 1902. If

<sup>8</sup> The recognition of settlements on reserved school lands is limited to settlements made before the survey of the land. Rev. Stat. sec. 2275; act of February 28, 1891 (26 Stat. 796; 43 U. S. C. sec. 851); cf. *United States v. Morrison, supra*; *Frands C. Grundvig*, 14 L. D. 291 (1892).

<sup>9</sup> It is a general rule that a survey is necessary before land can be segregated from the public domain by a sale. *Stoneroad v. Stoneroad*, 158 U. S. 240, 250 (1895); *Lane v. Watts*, 234 U. S. 525, 540 (1914).

<sup>10</sup> The decision in 32 L. D. 604 did not determine the point here at issue. That case was limited to the question whether possessory rights and improvements in a school section 36 in the Territory of Arizona could be acquired under the Reclamation Act (see, also, 34 L. D. 186). The case did not decide whether reserved school lands may be withdrawn after survey. While the decision properly emphasized the broad authority retained by Congress after the reservation of the land to the future State for school purposes, the following dictum in the decision (at p. 605) might be misunderstood: "Until Congress makes appropriation of such lands, or authorizes the Department to do so, no action of the Department or of the territorial government can vacate the present existing reservation or dedicate the land to the irrigation project." That dictum should not be understood to preclude reclamation withdrawals; in any event, if thus interpreted, it would appear to have been overruled by the decisions in 50 L. D. 628, 53 I. D. 365, the departmental approval of the General Land Office decision dated September 21, 1933, and the Department's decision in the case of *Lillian M. Peterson et al., supra*.



*August 19, 1946*

they were included in such withdrawal, title to the lands did not pass to the State of Arizona upon its admission to statehood, but the State is, of course, entitled to make lieu selections under section 24 of the Enabling Act. The departmental practice in this matter, as exemplified in the approval of the Land Office decision of September 21, 1933, *supra*, thus should be adhered to.

C. GIRARD DAVIDSON,  
*Assistant Secretary.*

### HOMER H. HARRIS

**A-24395***Decided August 19, 1946*

#### **Mineral Leasing Act—Sodium Prospecting Permits—Lands “in Reasonably Compact Form.”**

Where, because of prior disposals, a reasonably compact area of contiguous land cannot be obtained, the inclusion of incontiguous tracts will be deemed in compliance with the requirement of section 23 of the Mineral Leasing Act of February 25, 1920, that the lands be “in reasonably compact form,” provided the tracts are within an area of 6 miles square.

#### **APPEAL FROM THE GENERAL LAND OFFICE<sup>1</sup>**

Mr. Homer H. Harris filed an application (Evanston 022955) for a sodium prospecting permit<sup>2</sup> which, as twice amended, embraced the following lands:

T. 18 N., R. 109 W., 6th P. M., Wyoming,

sec. 6, all.

sec. 8, all.

sec. 18, all.

T. 19 N., R. 109 W., 6th P. M., Wyoming,

sec. 10, all.

On May 29, 1946, the Commissioner of the General Land Office ruled that sec. 10 is not reasonably compact with secs. 6, 8, and 18, as required for sodium prospecting permits under the Mineral Leasing Act and the regulations, and that Mr. Harris must amend his application to apply only for lands within an area of not more than 6 miles square.

<sup>1</sup> Effective July 16, 1946, the General Land Office and the Grazing Service were abolished and their functions were transferred to the Bureau of Land Management, by Reorganization Plan No. 3 of 1946 (11 F. R. 7875, 7876; 7776).

<sup>2</sup> This application is under section 23 of the Mineral Leasing Act of 1920 (41 Stat. 447), as amended by the act of December 11, 1928 (45 Stat. 1019; 30 U. S. C. sec. 261), and 43 CFR 195.1.

In his appeal (A-24395), Mr. Harris states that all the remaining land in the townships here involved have been either granted to the Union Pacific Railroad Company or to the State of Wyoming, or are covered by prior applications. He therefore urges that the lands he has applied for are in as reasonably compact form as possible under the circumstances and that it is not possible for him to amend his application to include four sections within a square of 6 miles square.

Section 23 of the Mineral Leasing Act requires that the area to be included in a sodium prospecting permit shall not exceed 2,560 acres of land "in reasonably compact form." In those instances where, because of prior disposals, a reasonably compact area of contiguous land cannot be obtained, the Department has generally permitted, as being in conformity with the requirement of the act that the lands be in reasonably compact form, the inclusion of incontiguous tracts in a permit provided they are at least within a square of 6 miles square, i. e., the area sought would be considered as in reasonably compact form even though the maximum of four sections are spread within a square the size of a township containing 36 sections.<sup>3</sup>

There is no occasion in this case even to consider the propriety of a further stretching of this already very liberal construction of the statutory requirement of "reasonably compact form." The record in this case indicates that just south of sec. 18, and cornering thereon, are two sections any portion of which is available to the applicant for inclusion in his sodium prospecting permit, up to the limits permissible by law.<sup>4</sup> These are sec. 20, T. 18 N., R. 109 W., and sec. 24, T. 18 N., R. 110 W. If the applicant applied for either one of these, the area within his permit would be within a rectangle 2 by 4 miles or 3 by 4 miles, well within the square of 6 miles square required by the Commissioner's decision. Mr. Harris did not indicate in his appeal that he would not have complied with the Commissioner's decision had he been aware of the availability of secs. 20 and 24, his appeal being based solely on the ground that he could not possibly secure four sections of land if he complied with the Commissioner's decision.

The decision of the Commissioner is affirmed.

C. GIRARD DAVIDSON,  
*Assistant Secretary.*

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<sup>3</sup> Instances of such action as early as 1921 are mentioned in the Department's decision of Fred Mathews, 48 L. D. 239, 240 (1921). See also, Helen F. Curns, 50 L. D. 353 (1924).

<sup>4</sup> The record indicates that these two sections are covered by oil and gas lease applications. But lands covered by oil and gas lease applications are not thereby prevented from inclusion in other permits or leases for other minerals under the Mineral Leasing Act of February 25, 1920. 43 CFR, Cum. Supp., 192.12.

## UTAH MAGNESIUM CORPORATION

A-24349

A-24351

*Decided September 11, 1946*

A-24353

**Mineral Leasing Act—Potassium Prospecting Permit.**

Issuance of a potassium prospecting permit is discretionary, and the filing of an application therefor confers no right on the applicant.

**Withdrawal Order—Mineral Leasing Act—Potassium Prospecting Permit.**

An order withdrawing lands from all forms of appropriation under the public-land laws, including the mineral leasing laws, is effective against a prior application for a permit to prospect for potassium on such lands.

**Mineral Leasing Act—Potassium Prospecting Permit—Constitutional Law.**

The denial of an application for a potassium prospecting permit does not constitute deprivation of property without due process of law.

**Mineral Leasing Act—Withdrawal Order—Constitutional Law.**

A withdrawal order which neither enhances nor diminishes existing rights does not deny equal protection of the laws to a prior applicant for a potassium prospecting permit.

**APPEAL FROM THE GENERAL LAND OFFICE<sup>1</sup>**

Utah Magnesium Corporation filed applications under the act of February 7, 1927,<sup>2</sup> for permits to prospect "for potassium and for magnesium and other minerals associated with the potassium deposits" on certain lands of the United States situated in Utah. The Commissioner of the General Land Office rejected the applications because the lands involved had been withdrawn by Public Land Order No. 256 of January 4, 1945,<sup>3</sup> from all forms of appropriation under the public-land laws, including the mineral leasing laws, and reserved for classification. From this rejection the applicant has appealed, assigning six specifications of error which will be considered in the order presented by the applicant.

1. The applicant asserts that the rejections disregard its rights as a qualified applicant whose filings were made prior to the date of the withdrawal order.

Section 1 of the act of February 7, 1927, *supra*, states that "the Secretary of the Interior is hereby authorized, under such rules and regulations as he may prescribe, to grant to any qualified applicant a prospecting permit \* \* \*." (30 U. S. C. sec. 281.) This language is practically identical with section 13 of the Mineral Leasing Act,

<sup>1</sup> Effective July 16, 1946, the General Land Office and the Grazing Service were abolished and their functions were transferred to the Bureau of Land Management, by Reorganization Plan No. 3 of 1946 (11 F. R. 7875, 7876; 7776).

<sup>2</sup> 44 Stat. 1057; 30 U. S. C. sec. 281 *et seq.*

<sup>3</sup> 10 F. R. 336.

as originally enacted.<sup>4</sup> It has been repeatedly held that the issuance of an oil and gas permit under section 13 is a matter confided to the discretion of the Secretary.<sup>5</sup> The potash act, being in a real sense a part of the Mineral Leasing Act, must be given the same construction. An application which requests the issuance of such a discretionary permit vests in the applicant no rights in the lands described or in the minerals therein; it is a mere request that a license be granted.<sup>6</sup> Consequently, it cannot be said that the applicant, by the filing of its applications, acquired any rights which could have been disregarded by the rejections.

Further, the effectiveness of a withdrawal order as against prior applications for permissive privileges has been upheld by the rulings of this Department<sup>7</sup> and sustained by the courts.<sup>8</sup>

2. The applicant next asserts that the withdrawal order is an arbitrary and unjust attempt to deny a qualified applicant the benefits of the Mineral Leasing Act under a filing made prior to the withdrawal.

The effect of the withdrawal order upon the applicant's prior applications has been discussed under the first specification of error. With respect to the contention that the withdrawal order is arbitrary or unjust, it is observed that the applicant tenders neither fact nor argument in support of the assertion. It may be noted, nevertheless, that the order itself recites the purpose for which it withdrew the lands described therein, "classification under the jurisdiction of the Secretary of the Interior." This is a valid purpose, sanctioned by the Congress<sup>9</sup> and by the courts.<sup>10</sup>

3. The applicant also contends that the withdrawal order is without and beyond the powers of the Secretary of the Interior.

That the Secretary of the Interior has authority to withdraw public lands from appropriation is no longer open to question. His powers

<sup>4</sup> 41 Stat. 437, 441.

<sup>5</sup> United States ex rel. Roughton v. Ickes, 101 F. (2d) 248 (1938); Wann v. Ickes, 92 F. (2d) 215 (1937); L. N. Hagood, 52 L. D. 630 (1929); Joseph C. Sampson, 52 L. D. 637 (1929); Martin Wolfe, 49 L. D. 625 (1923); Charles R. Haupt, 48 L. D. 355 (1921); Circ. No. 672, part 1, sec. 2, 47 L. D. 437, 438 (1920).

<sup>6</sup> United States ex rel. Roughton v. Ickes, *supra* (footnote 5); Joseph E. Hatch, 55 I. D. 580 (1936); McNeil v. Marias, 54 I. D. 333, 335 (1933); Lincoln-Idaho Oil Company, 51 L. D. 235, 238 (1925); Enlow v. Shaw, 50 L. D. 339 (1924).

<sup>7</sup> Harold S. Anderson, Jr., *et al.*, A. 23795, May 10, 1944 (unreported); Elsie M. Grammer *et al.*, A. 23730, December 31, 1943, rehearing denied April 24, 1944 (unreported); Lincoln-Idaho Oil Company, *supra* (footnote 6).

<sup>8</sup> United States ex rel. Barton v. Wilbur, 283 U. S. 414 (1931).

<sup>9</sup> 36 Stat. 847; 43 U. S. C. sec. 141.

<sup>10</sup> United States v. Midwest Oil Company, 236 U. S. 459, 481 (1915).

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in this regard have been properly authorized by the President<sup>11</sup> and recognized by the courts.<sup>12</sup>

4. The applicant next urges that the order is an arbitrary and unreasonable discrimination against certain applicants and applications in contrast with other applicants and applications having no greater rights.

Again, the applicant has not seen fit to expand its contention of illegality and, more, does not even assert that the alleged discrimination operates against it. But apart from this, it should be sufficient to point out that the order affects equally all applicants for prospecting permits upon the same lands. With respect to the lands withdrawn for classification by Public Land Order No. 256, no such prospecting permit as applicant seeks has been issued to one applicant and denied to another. All are equally affected by the order and their applications disposed of accordingly.

5. It is next asserted that applicant is deprived of its property without due process of law.

As indicated above, the filing of its applications conferred upon the applicant no right either to have its applications granted or to use the land it seeks. Having acquired no property by the filing of its applications and having been deprived of no property which it holds outside of this proceeding, the applicant cannot be said to have suffered any unlawful deprivation.

Nor, incidentally, can it be said the applicant has not been accorded due process of law. It has received a full opportunity to present in writing to both the General Land Office<sup>13</sup> and the Secretary of the Interior,<sup>14</sup> all facts, information, and argument on behalf of its request for permission to prospect for natural resources on lands belonging to the United States.

6. Applicant contends finally that it is denied the equal protection of the laws.

The withdrawal effected by Public Land Order No. 256 applies equally to all persons; the rights of no person have been either enhanced or diminished by the order.

The decision of the Commissioner is affirmed.

WARNER W. GARDNER,  
*Assistant Secretary.*

<sup>11</sup> Executive Order No. 9337 of April 24, 1943 (8 F. R. 5516).

<sup>12</sup> *Wilbur v. United States ex rel. Barton*, 46 F. (2d) 217 (1930); *affirmed on other grounds* 283 U. S. 414 (1931).

<sup>13</sup> 43 Code of Federal Regulations, Part 194.

<sup>14</sup> 43 CFR 221.71-221.80.

## AUTHORITY OF DEPARTMENT OF THE INTERIOR TO BARGAIN COLLECTIVELY WITH REPRESENTATIVES OF ITS UNGRADED EMPLOYEES

### Federal Employees—Ungraded—Collective Bargaining—Department of the Interior.

The bureaus and agencies of the Department have the right to bargain collectively with representatives of their ungraded employees on all matters within their discretion, and particularly with respect to wages and working conditions.

M-34488

SEPTEMBER 13, 1946.

#### THE SECRETARY OF THE INTERIOR.

MY DEAR MR. SECRETARY: The Commissioner, Bureau of Reclamation, has requested a formal Solicitor's opinion on the authority of the Bureau, acting in behalf of the United States, to enter into collective bargaining agreements with labor organizations with respect to its ungraded employees. The Commissioner refers to an agreement, effected on February 3, between the Bonneville Power Administration and the Columbia Power Trades Council (AFL), providing for increased hourly rates of pay for construction, operation, and maintenance workers employed by the Bonneville Power Administration. He advises that the increased wage rates for Bonneville's employees are now higher than those of a substantial portion of similarly classified employees of the Bureau's Columbia Basin project, and anticipates that representatives of those employees will request wage adjustments by the Bureau based upon similar collective bargaining agreements.

It is my opinion that the Bureau of Reclamation, as well as the Bonneville Power Administration and other bureaus of the Department, is legally authorized to enter into collective bargaining agreements with labor organizations with respect to such employees on matters within the discretion of such agencies.

Section 10 of the basic reclamation law of June 17, 1902 (32 Stat. 388, 390; 43 U. S. C. sec. 373), provided, "That the Secretary of the Interior is hereby authorized to perform any and all acts and to make such rules and regulations as may be necessary and proper for the purpose of carrying the provisions of this Act into full force and effect." The authorization was repeated in the amendatory acts of August 13, 1914 (38 Stat. 686, 690), and May 16, 1930 (46 Stat. 367, 368). This authority extends generally to the making of agreements which are properly incidental to the accomplishment of the statutory objectives of the Bureau.<sup>1</sup>

<sup>1</sup> For recent comment on collective bargaining agreements, see Steinberg, "Federal Control of Collective Bargaining," 38 Ill. L. Rev. 128-166 (1943); Jaffe, "Union Security: A Study of the Emergence of Law," 91 U. of Pa. L. Rev. 275-311 (1942); Lenhoff, "The

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By Departmental Orders Nos. 2095 and 2159, dated August 29, 1945, and January 25, 1946, respectively, there has been delegated to the Commissioner of Reclamation the authority to engage ungraded employees.<sup>2</sup> Wage-board determinations are subject to the review and recommendation of the Special Adviser on Labor Relations, and final approval of the Secretary of the Interior.<sup>3</sup>

It has been the practice of the Interior Department, in its wage-board deliberations, comprehensively to consider all local factors bearing upon the appropriate wage to be paid to such employees, including wage scales advocated by labor unions. In areas where the workers are highly unionized, so that the factor of the union wage scale outweighs all others, agreements respecting wages are reached primarily on the basis of the union scale, after negotiation with union representatives. The Alaska Railroad and the Bonneville Power Administration are specific examples of this practice.<sup>4</sup> So far

Present Status of Collective Contracts in the American Legal System," 39 Mich. L. Rev. 1109-1153 (1940-1941); Christenson, "Legally Enforceable Interests in American Labor Union Working Agreements," 9 Ind. L. J. 69-108 (1933-1934); Note, 44 Col. L. Rev. 409-432 (1944); "Right of Municipality to Enter Into Collective Bargaining Agreement on Behalf of Civil Service Employees," Notes and Legislation, 18 N. Y. U. L. Q. Rev. 247, 250 (1941); Ziskind, "One Thousand Strikes of Government Employees," Col. Univ. Press, p. 246 (1940); Rhyne, "Power of Municipalities to Enter Into Labor Union Contracts—A Survey of Law and Experience," Rept. No. 76, August 1941, National Institute of Municipal Law Officers, Washington, D. C.; Pressman, "Legal Memorandum in Support of Power of Municipalities to Enter Into Collective Agreements," March 1942, prepared for the State, County, and Municipal Workers of America, CIO.

<sup>2</sup> "Ungraded" employees are employees whose wages are not fixed pursuant to the provisions of the Classification Act of 1923 (42 Stat. 1488; 5 U. S. C. sec. 661), as amended, but as a result of the deliberations of wage boards, established pursuant to the provisions of the act of March 28, 1934 (48 Stat. 522; 5 U. S. C. sec. 673e). The provision (section 23) reads as follows:

"The weekly compensation, minus any general percentage reduction which may be prescribed by Act of Congress, for the several trades and occupations, which is set by wage boards or other wage-fixing authorities, shall be reestablished and maintained at rates not lower than necessary to restore the full weekly earnings of such employees in accordance with the full-time weekly earnings under the respective wage schedules in effect on June 1, 1932: *Provided*, That the regular hours of labor shall not be more than forty per week; and all overtime shall be compensated for at the rate of not less than time and one half."

<sup>3</sup> The Comptroller General has held that the wage-board procedure of the Department of the Interior "properly is to be regarded as one of the 'wage boards or other wage-fixing authorities' within the meaning of the act \* \* \*." (Decision B-33619 of April 15, 1943.)

<sup>4</sup> Departmental Order No. 1921, of February 15, 1944; Departmental Order No. 1989, of September 8, 1944; Regulations and Procedures contained in PS&M Memorandum No. 135, of March 30, 1945. There is now under consideration the delegation of authority finally to approve wage-board determinations to the Director of Personnel for the Department.

<sup>5</sup> The authority of The Alaska Railroad is derived from the act of March 12, 1914 (38 Stat. 305; 48 U. S. C. sec. 301), authorizing the President "to fix the compensation of all officers, agents, or employees appointed or designated by him" in the operation of the railroad; Executive Order No. 3861 of June 8, 1923, delegating that authority to the Secretary of the Interior, and regulations prescribed by the Secretary on January 11, 1929, governing the office of the General Manager of the railroad. That of the Bonneville Power Administration is derived from the Bonneville Power Act (50 Stat. 732; 16 U. S. C. sec. 832a (f)), as amended, which authorized the Administrator, "in the name of the United States, to negotiate and enter into such contracts, agreements, and arrangements as he shall find necessary or appropriate to carry out the purposes of" the act.

as these two agencies are concerned, entrance into written agreements with unions merely would be formalizing a procedure which heretofore has been pursued in the establishment of rates for their wage-board employees. In similar circumstances, there appears no reason why the Bureau of Reclamation, or other bureaus of the Department, could not do likewise.

There are apparently no statutes or specific decisions with respect to the authority of a Federal Government agency, as an employer, to enter into collective bargaining agreements. In 1935, there was enacted the National Labor Relations Act which implemented labor's right to organize and to bargain collectively by proscribing certain "unfair labor practices" by employers.<sup>5</sup> However, that act specifically excludes from the definition of employers subject to its terms the United States or any State or political subdivision thereof.

Recent Presidential expressions of policy furnish the most authoritative indication of the trend of governmental activity in the field of collective bargaining. In a letter of August 16, 1937, to the President of the National Federation of Federal Employees, President Roosevelt said:

\* \* \* Organizations of Government employees have a logical place in Government affairs.

The desire of Government employees for fair and adequate pay, reasonable hours of work, safe and suitable working conditions, development of opportunities for advancement, facilities for fair and impartial consideration and review of grievances, and other objectives of a proper employee relations policy, is basically no different from that of employees in private industry. Organization on their part to present their views on such matters is both natural and logical \* \* \*.

All Government employees should realize that the process of collective bargaining, as usually understood, cannot be transplanted into the public service. It has its distinct and insurmountable limitations when applied to public personnel management. The very nature and purposes of Government make it impossible for administrative officials to represent fully or to bind the employer in mutual discussions with Government employee organizations. The employer is the whole people, who speak by means of laws enacted by their representatives in Congress. Accordingly, administrative officials and employees alike are governed and guided, and in many instances restricted, by laws which establish policies, procedures, or rules in personnel matters.

Particularly, I want to emphasize my conviction that militant tactics have no place in the functions of any organization of Government employees. Upon employees in the Federal service rests the obligation to serve the whole people, whose interests and welfare require orderliness and continuity in the conduct

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<sup>5</sup> 49 Stat. 449; 29 U. S. C. sec. 151 *et seq.* For a discussion of the trend of State legislation enacted subsequently, see Dodd, "Some State Legislatures Go to War—on Labor Unions," 29 Iowa L. Rev. 148 (1944).



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of Government activities. This obligation is paramount. Since their own services have to do with the functioning of the Government, a strike of public employees manifests nothing less than an intent on their part to prevent or obstruct the operations of Government until their demands are satisfied. Such action, looking toward the paralysis of Government by those who have sworn to support it, is unthinkable and intolerable. It is, therefore, with a feeling of gratification that I have noted in the constitution of the National Federation of Federal Employees the provision that "under no circumstances shall this Federation engage in or support strikes against the United States Government."

President Truman also has condemned the resort to strikes against the Government.<sup>6</sup>

A similar view with respect to city employees was stated by the National War Labor Board in a report of December 24, 1942, titled "Municipal Government, City of Newark, N. J., and State, County, and Municipal Workers of America, Local 277 (CIO)" (5 War Lab. Rep. 286), in the following terms:

Although government employees have no right to employ the strike method in settling their labor disputes with Government, the corollary does not follow that government employees are without the right to organize and participate in a limited form of collective bargaining with Government. \* \* \*

\* \* \* \* \*  
*There is nothing illegal in the conducting of formal discussions by officials of government with representatives of their organized employees relative to wages and to conditions of employment, such as working hours and suitable grievance procedures. Unless compensation is fixed by State statute \* \* \* employees do not act adversely to the interests of the government when they request that ordinances pertaining to wages or working conditions be modified or that discretionary powers of government officials be exercised in bringing about better working conditions and more substantial wages. [Italics supplied.] (Pp. 293-294.)*

The attitude of State officials is indicated by an opinion of the Deputy Attorney General for the State of California, upholding the right of local housing authorities to bargain with their employees through representatives chosen by the employees and to enter into agreements concerning hours, wages, and conditions of employment (4 Ops. Atty. Gen. Calif. 138, August 24, 1944).

I, accordingly, am of the opinion that the Bureau of Reclamation, like all other agencies of the Department with similar problems, may enter into collective bargaining agreements governing the topics enumerated in the foregoing Presidential statements to the extent that dealings with respect to those topics are within the discretion of the bureaus and agencies. The topics include wages and hours, safe and suitable working conditions, the development of opportuni-

<sup>6</sup> Washington Post, May 3, p. 1.

ties for advancement, facilities for fair and impartial consideration of grievances, and other objectives of a proper employee relations policy.

FELIX S. COHEN,  
*Acting Solicitor.*

Approved:  
OSCAR L. CHAPMAN,  
*Acting Secretary.*

### ELMER K. NELSON

A-24378

*Decided September 18, 1946*

#### Employees of Department of the Interior—Application for Oil and Gas Lease—Assignments—Application by Association.

It is against public policy for an employee of the Department of the Interior to acquire any interest in public land, including interests in oil and gas leases. No lease will, therefore, be issued to a departmental employee even though he had filed his application before he became employed, nor may he assign a mere application. The application having for many years been maintained in the employee's own name, it cannot be treated as an association application on behalf of those whom he now states he actually represented, since it did not comply with the regulations requiring disclosure of the names, addresses, citizenship, and interests of the members of the association. Generally, the Department recognizes only the holders of record in dealing with the various aspects of the lease or application.

#### APPEAL FROM THE GENERAL LAND OFFICE<sup>1</sup>

On August 5, 1935, Mr. Elmer K. Nelson filed, in his own name, an application for an oil and gas lease<sup>2</sup> covering certain lands in the State of Wyoming. A series of actions then followed, including amendment by Mr. Nelson of his application, its consolidation with other applications he had filed, the elimination of conflicts with the applications and entries of other public-land applicants, and the rendition of a decision by the Secretary on an appeal by Mr. Nelson (A-23796). On October 8, 1945, the amendments, consolidations, conflicts, and appeal having finally been disposed of, the Commissioner

<sup>1</sup> Effective July 16, 1946, the General Land Office and the Grazing Service were abolished and their functions were transferred to the Bureau of Land Management, by Reorganization Plan No. 3 of 1946 (11 F. R. 7875, 7876; 7776).

<sup>2</sup> Mr. Nelson's application (Cheyenne 059399) was for an oil and gas prospecting permit pursuant to section 13 of the Mineral Leasing Act of February 25, 1920 (41 Stat. 437, 441, as amended). Under the amendatory act of August 21, 1935 (49 Stat. 674), Mr. Nelson's application for a prospecting permit, having been filed within the 90-day period preceding August 21, 1935, was thereafter to be considered as an application for a lease under section 17 of the Mineral Leasing Act, as amended (30 U. S. C. sec. 226).

September 18, 1946

of the General Land Office transmitted lease and bond forms to Mr. Nelson for execution. On October 30, 1945, Mr. Nelson, having noted that a lease may not be issued to an employee of this Department,<sup>3</sup> stated for the first time that on July 1, 1945, he had accepted a position with the Bureau of Reclamation of this Department,<sup>4</sup> and that his application, although filed in his own name, was in reality on behalf of a joint venture now consisting of three other persons beside himself. Mr. Nelson filed a copy of an "Agreement on Joint Adventure," not under seal or acknowledged, dated July 12, 1935, and executed by Mr. Nelson and four individuals.<sup>5</sup> He requested the Commissioner to approve either (1) the issuance of a lease to him upon condition that he immediately assign it to his daughter, or, if such approval could not be given, (2) the assignment of his interest to his daughter followed by the issuance of the lease to her. Mr. Nelson did not indicate whether his daughter would hold such lease in her own name or as trustee for those interested in the joint agreement, or whether he was renouncing any interest under the joint agreement.

By decision of December 18, 1945, the Commissioner held (a) that no lease could be issued to Mr. Nelson in his name, and (b) that even if Mr. Nelson were a qualified applicant, he could not assign to anyone his rights in an oil and gas application.<sup>6</sup> The Commissioner therefore rejected Mr. Nelson's application.

After several extensions of time had been granted to Mr. Nelson to appeal from the Commissioner's decision, he filed an appeal (A-24378), on June 3, 1946, withdrawing his requests that a lease be issued to him or that he be permitted to assign his oil and gas lease application to his daughter, now urging instead that the lease be given to the three individuals whom he claims to have represented under the "Agreement on Joint Adventure" of July 12, 1935. Mr. Nelson stated in his appeal that he was forwarding copies of his appeal to the three interested persons, requesting them to supply additional statements. Several months have now elapsed, but no such statements have been received from any of them.

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<sup>3</sup> Section 9 of the standard oil and gas lease form provides: "Unlawful interest. \* \* \* no officer, agent, or employee of the Department of the Interior, shall be admitted to any share or part in this lease or derive any benefit that may arise therefrom; \* \* \*." (43 CFR 192.28.)

<sup>4</sup> Mr. Nelson is now employed as Field Representative of the Bureau of Reclamation, stationed in Washington, D. C.

<sup>5</sup> The three other persons named by Mr. Nelson as now interested are G. R. McConnell, Albert Cronberg, and J. E. Friday. Another signatory to the joint agreement, James B. True, is now deceased; and Mr. Nelson states that True has no interest. Cf. section 7 of the "Agreement on Joint Adventure."

<sup>6</sup> Ever since 1920, the Department's regulations have expressly stated that mere rights to receive a lease are not assignable (43 CFR 192.41; 43 CFR, Cum. Supp., 192.41).

The decision of the Commissioner was correct. Under the regulations of this Department and the provisions of the oil and gas lease (43 CFR 192.28), no officer, agent, or employee of this Department may secure any share or benefit in the lease. The acquisition by an employee of the Department of any interest in public land is against both departmental policy and the public interest.<sup>7</sup> Nor could a mere applicant for an oil and gas lease assign anything prior to the issuance of a lease. 43 CFR, Cum. Supp., 192.41.

The request which Mr. Nelson now makes in his appeal that the lease be issued to the three individuals he names does not warrant reversal of the Commissioner's decision.

First, the agreement provides that any interest acquired by the group pursuant to the agreement "shall be taken in the names of the parties hereto and that the interests so acquired shall be the property of the group" and requires that each of the parties will promptly issue to each of the other parties proper papers to show their respective interests. Since Mr. Nelson has not in any way indicated that he has effectively renounced his interest under that agreement, it is obvious that granting his request would enable him to secure a share in the lease, contrary to the applicable regulations.<sup>8</sup> And even if he renounced to the other parties his interest under the agreement, *quaere* whether that would not constitute in effect the assignment to them of his interest in the application, contrary to the applicable regulations.

Second, there is in any event a further sound reason for denying Mr. Nelson's appeal. For more than 10 years Mr. Nelson maintained the application solely in his own name. Assuming, as he now suggests, that his application was in fact an application by an association, the application did not comply with the regulations requiring disclosure of the names, addresses, citizenship, and interests of the members of the association applying for the lease (43 CFR 192.23). It should, therefore, have been rejected on that ground. The soundness of such rejection and of refusing to give general recognition to undisclosed parties not of record is further reinforced by the considerations that otherwise the administration of the Mineral Leasing Act would become burdensome and the door would be opened to widespread violation of the requirements of the act, including the provisions relating

<sup>7</sup> Assistant Secretary Chapman's memorandum of May 16, 1945, to the Commissioner of the General Land Office (Salt Lake City 063226).

<sup>8</sup> Furthermore, his acquisition of such interest might conceivably violate section 113 of the Criminal Code (18 U. S. C. sec. 203) which penalizes, by fine up to \$10,000 and imprisonment up to 2 years, any "officer or clerk in the employ of the United States, [who] shall, directly or indirectly, receive, or agree to receive, any compensation whatever for any services rendered or to be rendered to any person, either by himself or another, in relation to any \* \* \* contract, claim, controversy, \* \* \* or other matter or thing in which the United States is a party or directly or indirectly interested, before any department \* \* \*."

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to citizenship, acreage limitations, monopoly, etc. These considerations are applicable and pertinent even if there were no such violation either effected or intended in this case. Insofar as this Department is concerned, therefore, the Department generally recognizes only the holder of record in dealing with the various aspects of their relations under the terms of the lease or application.<sup>9</sup> Mr. Nelson's failure, until now, to file the application in the names of all the parties to the agreement is a matter for him to settle with them—his present disclosure cannot change the application's original invalidity as an association application. And as has already been demonstrated, a lease may not issue to him directly nor may he assign his application to any one else.

The decision appealed from is affirmed.

R. R. SAYERS,  
*Acting Assistant Secretary.*

## AUTHORITY TO PREPARE PUBLIC LANDS FOR IRRIGATION

### Reclamation—Public Lands—Preparatory Work.

The authority of the Secretary under the reclamation laws extends to the construction of all irrigation features or works which may be necessary or advisable and practicable to provide irrigation facilities for the arid lands within a project area.

### Reclamation—Public Lands—Preparatory Work—Farm Distribution Systems.

The authority conferred by the reclamation laws upon the Secretary is sufficiently broad to permit the roughing in of farm distribution systems on public lands as an incident of the construction of an irrigation project.

### Reclamation—Public Lands—Preparatory Work—Land Leveling.

Where the topography is such that a farm distribution system cannot effect the ready spreading of water by gravity, the leveling of such public lands within an irrigation project for prospective farm use is authorized by the reclamation laws.

### Reclamation—Public Lands—Preparatory Work—Cover Crops.

Whenever it reasonably appears that, in the absence of a cover crop on public lands within an irrigation project, erosion will result, with attendant damage to canals, laterals, and farm ditches, the planting of such crops is authorized by the reclamation laws.

### Soil Conservation—Public Lands—Work Preparatory to Irrigation.

When it is determined that such operations as the leveling of land, construction of farm ditches, and establishment of cover crops on public lands within

<sup>9</sup> 43 CFR, Cum. Supp., 192.41; see *Peterson v. Ickes*, 80 App. D. C. 198, 151 F. (2d) 301 (1945), *cert. denied* 326 U. S. 795 (1946).

an irrigation district, are reasonably calculated to control and prevent erosion, authority is vested in the Secretary by the Soil and Moisture Conservation Act of 1935 and section 6 of Reorganization Plan No. IV to conduct such operations.

M-34695

SEPTEMBER 24, 1946.

THE SECRETARY OF THE INTERIOR.

MY DEAR MR. SECRETARY: My opinion has been requested regarding the legal authority of the Bureau of Reclamation to engage in certain work for the protection and development of unentered and entered public lands. The works contemplated are "the clearing and leveling of public lands, the roughing in of farm distribution systems for the distribution of irrigation water, and the establishment of cover crops."

This legal problem is outlined in a memorandum dated September 13, 1946, from Acting Commissioner Warne to the Secretary, and referred to this office by the Under Secretary. Mr. Warne states:

Such development work is essential to the opening of the raw public lands which will be brought under irrigation in order that the entryman will have reasonable opportunity of success and thereby to effect repayment of invested Federal funds. That involves work beyond the capacity of individual entrymen. It requires that heavy equipment and related facilities be available to assist entrymen, with reimbursement to the Government of land development costs over a period of years. There is no agency other than the Bureau of Reclamation equipped to accomplish this work on reclamation projects. The Bureau is prepared to provide the needed assistance on a suitable reimbursable basis.

Furthermore, public lands within certain reclamation projects in the arid and semiarid areas of the West are in process of conversion from uses confined largely to grazing into productive irrigated farms for settlement, probably as indicated from the extensive number of their applications almost entirely by veterans of World War II. Extended experience in earlier land openings has demonstrated that if left entirely to his own resources usually the entryman does not feel warranted in making, nor would he probably be in a position to make, the early initial expenditure requisite for placing the major portion of a farm unit of such raw public land in cultivation. Unless the required leveling is done to a proper gradient and with properly integrated ditches, wasteway disposal and related facilities and, in proper cases, the establishment of some cover crops is accomplished, there is inevitably encountered the hazard of destructive wind and water erosion, pending the time that substantial portions of farm units have been subjected to irrigated farming.

My opinion is requested as to the Bureau's legal authority to engage in such activities under (1) the Federal reclamation laws (act of June 17, 1902, 32 Stat. 388, and acts supplementary thereto and amendatory thereof), or (2) under any other statutory authority.

*September 24, 1946*

## I

The basic authority for the construction of reclamation works is to be found in the Reclamation Act of 1902. Section 2 of that act (43 U. S. C. sec. 411) provides:

That the Secretary of the Interior is hereby authorized and directed to make examinations and surveys for, and to locate and construct, as herein provided, irrigation works for the storage, diversion, and development of waters, including artesian wells, and to report to Congress at the beginning of each regular session as to the results of such examinations and surveys, giving estimates of cost of all contemplated works, the quantity and location of the lands which can be irrigated therefrom, and all facts relative to the practicability of each irrigation project; also the cost of works in process of construction as well as of those which have been completed.

Section 4 of the 1902 act (43 U. S. C. sec. 419) provides:

That upon the determination by the Secretary of the Interior that any irrigation project is practicable, he may cause to be let contracts for the construction of the same, in such portions or sections as it may be practicable to construct and complete as parts of the whole project, providing the necessary funds for such portions or sections are available in the reclamation fund, and thereupon he shall give public notice of the lands irrigable under such project, and limit of area per entry, which limit shall represent the acreage which, in the opinion of the Secretary, may be reasonably required for the support of a family upon the lands in question; also of the charges which shall be made per acre upon the said entries, and upon lands in private ownership which may be irrigated by the waters of the said irrigation project, and the number of annual installments, not exceeding ten, in which such charges shall be paid and the time when such payments shall commence. The said charges shall be determined with a view of returning to the reclamation fund the estimated cost of construction of the project, and shall be apportioned equitably: *Provided*, That in all construction work eight hours shall constitute a day's work, and no Mongolian-labor shall be employed thereon.

These provisions authorize the Secretary of the Interior, through the Bureau of Reclamation, to locate, and, upon satisfying the requirements of subsequent acts regarding reports for the authorization of projects, to construct such works as he may determine are necessary or advisable and practicable for irrigation projects, and to enter into necessary contracts therefor.

The Congress has not attempted in the reclamation laws to enumerate in detail the types of irrigation features which are authorized to be constructed in connection with irrigation projects. In recognition of the complex nature of the reclamation program, and of the fact that irrigation features which are needed and practicable for one project may not be needed or practicable for another project, it has left this determination to the Secretary. Such a discretion is necessary in the light of progress in the field of engineering, the information

gathered with experience through the years in administering the reclamation laws, and the conditions that vary from project to project. The authority of the Secretary extends to the construction of all irrigation works which may be necessary or advisable and practicable to provide irrigation facilities for the arid land encompassed within a project area.<sup>1</sup>

Since the costs of constructing irrigation works allocated to irrigation are by law made reimbursable, it is intended that the United States shall recover its expenditures for such purposes. In order adequately to protect the investment of the Government and to make reasonably certain that entrymen on reclamation projects will be able to repay construction costs, it may be reasonably determined by the Secretary that it is necessary or advisable to construct irrigation works of a more extensive nature on one project than on another. The authority to make such a determination is limited only by the requirement that the works shall be necessary or incidental to the construction of an irrigation project within the reclamation program.

It is clear that the bringing of water from the lateral to the edge of an arid farm unit will not in all cases provide sufficient facilities to insure that such land will be brought under irrigation. In some cases this can be accomplished only by constructing additional irrigation features of the sort included within the phrase "the roughing in of farm distribution systems." Such systems are, in appropriate cases, as integral a part of the entire irrigation works as any other feature of the project, and such construction must be done if the purposes for which the particular reclamation project is undertaken are to be achieved. Therefore, I am of the opinion that there exists the authority under the Federal reclamation laws to rough in farm distribution systems on public lands as an incident of the construction of an irrigation project.

In order to provide a flow of water for irrigation purposes, it is necessary that canals, laterals, and ditches be constructed at proper elevations and to a proper gradient. Where the nature of the topography is such that the farm distribution system cannot function to effect the ready spreading of water by gravity, it is necessary that the terrain be leveled sufficiently to accomplish that end. Thus, it is manifest that the leveling of public lands within an irrigation project for prospective farm use is sometimes essential to the adequate functioning of the farm distribution system for the purpose which it must serve. When that is the case, such work is an authorized function under the reclamation laws.

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<sup>1</sup> *Yuma County Water Users' Ass'n v. Schlecht*, 275 Fed. 885 (C. C. A. 9th, 1921) *aff'd* 262 U. S. 138 (1923), 43 Sup. Ct. 498, 67 L. ed. 909.



September 24, 1946

The third type of operation mentioned is the establishment of cover crops. The authorization of the reclamation laws is not limited merely to the construction of irrigation features necessary or incidental to the irrigation project, but it extends also to such steps as appear to be reasonably necessary to protect the irrigation features, as the property of the United States, from damage or destruction. Thus, whenever it reasonably appears that, in the absence of a cover crop on public lands within an irrigation project, erosion will result, with attendant damage to canals, laterals, and farm ditches located in the area, it is my opinion that the planting of such crop is authorized.<sup>2</sup> The fact of an incidental benefit to the land on which the cover crop is placed does not detract from or otherwise affect this authority.

Insofar as the administrative practice which has prevailed within the Department is concerned, it should be noted that the Bureau of Reclamation has performed predevelopment work on public land for farm units preparatory to homestead entry on irrigation projects.<sup>3</sup> For example, there were cleared and prepared for initial farming thousands of acres of public land on the Newlands project, Nevada,<sup>4</sup> the Grand Valley project, Colorado,<sup>5</sup> the Sun River project, Montana,<sup>6</sup> and the Gila project, Arizona.<sup>7</sup>

In the case of the Gila project, there appeared in the Interior Department Appropriation Acts for 1944, 1945, 1946, and 1947<sup>8</sup> specific language providing for the use of construction funds for land leveling, construction of farm ditches, and production of soil-building crops. In the course of the enactment of this special appropriation, the Congress appeared to be aware of the fact that it was not adding to the existing authority under the reclamation law, but, on the contrary, that such activities would be undertaken pursuant to existing authority.<sup>9</sup>

<sup>2</sup> In an unreported departmental decision, dated July 24, 1912 (Federal Reclamation Laws Annotated, 1943, p. 62), it was determined that the Reclamation Act of 1902 permitted the United States to purchase land and to establish and maintain thereon plantations of trees and shrubs to serve as windbreaks for the purpose of protecting the agricultural development of adjacent irrigable lands as well as the protecting of irrigation canals and laterals.

<sup>3</sup> S. Rept. 1589, 79th Cong., 2d sess. (1946).

<sup>4</sup> Seventeenth Annual Report, Reclamation Service (Bureau of Reclamation), 1917-1918, p. 214. See, also, 9 Reclamation Record 127, 128, and 131 (March 1918).

<sup>5</sup> Departmental order, dated February 28, 1920, opening 10 farm units for entry on Grand Valley project, Colorado.

<sup>6</sup> Project History, Sun River project, Montana, 1917.

<sup>7</sup> 60 Stat. 348.

<sup>8</sup> 57 Stat. 451; 58 Stat. 463; 59 Stat. 318; 60 Stat. 348.

<sup>9</sup> In the record of the Hearings before the Subcommittee of the House Committee on Appropriations considering the Interior Department Appropriation Bill for 1944, the following testimony appears at p. 453 in connection with the appropriation for the Gila project:

"Mr. JOHNSON of Oklahoma. Do you believe you have authority to undertake this work without any authority in this proposed new language at the bottom of page 164?

"Mr. PAGE. I rather think so.

The legal conclusions previously stated are not affected by the circumstance that the recent bill (H. R. 5654, 79th Cong., 2d sess.) to provide basic authority for the performance of certain functions and activities of the Bureau of Reclamation, which was vetoed by the President, provided specifically in section 1 (h) that the Bureau should have authority to undertake works of a predevelopment nature. It was the stated purpose of the bill specifically to codify various powers vested in the Secretary or the Bureau by the general terms of the Federal reclamation laws, in order to preclude the possibility that points of order to such items might be raised when appropriations therefor were under consideration in the Congress, although it was stated that the bill was not to be construed as meaning that the items would in fact be subject to such points of order.<sup>10</sup> Hence, the failure of this bill to become law does not affect, from the legal standpoint, those powers which already existed in the Secretary or the Bureau by virtue of the general or specific provisions of the reclamation laws.

## II

There exists in the Secretary certain authority, outside the reclamation laws, to construct engineering works for the purpose of providing for the control and prevention of soil erosion. The basic authority is derived from the Soil and Moisture Conservation Act of April 27, 1935.<sup>11</sup>

This act originally established the Soil Conservation Service in the Department of Agriculture. Section 6 of Reorganization Plan No. IV<sup>12</sup> vested in the Secretary of the Interior, for performance through such agency or agencies of the Department of the Interior as he might designate, the functions of the Soil Conservation Service insofar as they relate to lands under the jurisdiction of the Department of the Interior.<sup>13</sup> Only those functions of the Soil Conservation Service derived from the act of April 27, 1935, *supra*, were thus transferred to the Department of the Interior.<sup>14</sup>

Section 1 of the basic 1935 act (16 U. S. C. sec. 590a) declares the purpose of the measure to be that of providing permanently for the

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"MR. JOHNSON of Oklahoma. You think you would have authority, but you want to be certain.

"MR. PAGE. Yes; I have a wholesome fear of the Comptroller General holding up some of the accounts.

"MR. JOHNSON of Oklahoma. Would that be legislation or a limitation?

"MR. PAGE. I do not think it would be legislation. It is just stating the purpose for which the money is made available."

<sup>10</sup> S. Rept. 1585, 79th Cong., 2d sess. (1946); H. Rept. 1683, 79th Cong., 2d sess. (1946).

<sup>11</sup> 49 Stat. 163.

<sup>12</sup> 54 Stat. 1234.

<sup>13</sup> Sol. Ops. of October 25, 1941, 57 I. D. 382, and May 31, 1943, 58 I. D. 449.

<sup>14</sup> Op. Atty. Gen., August 5, 1941.

*September 24, 1946*

control and prevention of soil erosion as a means of attaining the beneficial results, among others, of the preservation of the natural resources of the Nation, and the protection of public lands. In order to achieve the objective of the statute, authority is conferred in subsection (2) of section 1—

To carry out preventive measures, including, but not limited to, engineering operations, methods of cultivation, the growing of vegetation, and changes in use of land.

The reports of the Committees of the House of Representatives<sup>15</sup> and of the Senate<sup>16</sup> which considered this legislation both make unmistakably clear the intentional breadth of the language quoted above, in these terms:

Subsection (2) of section 1 authorizes various types of preventive measures which are necessary to control erosion. The language of this subsection is necessarily sufficiently broad to permit an effective, balanced, and adaptable use of all known practical methods of erosion control and of any new measures which may be developed in the future.

Acting Commissioner Warne's memorandum reports that unless preparatory work, such as clearing and leveling the land to the proper gradient and constructing farm ditches in order properly to place water on the land, all of which involve engineering operations of a high standard of technical execution, is undertaken, the hazard of erosion by hydraulic processes to a very destructive degree will be encountered. Furthermore, the growth of a cover crop may reasonably appear to be necessary in some situations in order to prevent the hazard of erosion by the operation of wind or water. Of course, the question as to whether such operations as the leveling of land, construction of farm ditches, and establishment of cover crops on public lands are reasonably calculated to result in the control and prevention of erosion is, in any particular case, for determination in the exercise of a sound discretion by the Secretary or those to whom he has delegated his authority under section 6 of Reorganization Plan No. IV. Therefore, I am of the opinion that in proper cases, as determined by the Secretary or persons designated by him, authority exists under the Soil and Moisture Conservation Act of 1935 and section 6 of Reorganization Plan No. IV to perform the types of operations mentioned above in the interest of preventing and controlling erosion by wind and water on public lands within irrigation projects.

Of course, only funds appropriated to this Department for operations under the Soil and Moisture Act of 1935 are available for activities and works under that statute within irrigation projects.

<sup>15</sup> H. Rept. 528, 74th Cong., 1st sess. (1935).

<sup>16</sup> S. Rept. 466, 74th Cong., 1st sess. (1935).

### III

Before you authorize the Bureau of Reclamation to undertake, either under the reclamation laws or under the Soil and Moisture Conservation Act of 1935, preparatory work of the sort discussed in this memorandum, you will doubtless wish to consider, from the standpoint of policy, the language used by the President in his veto message on H. R. 5654, 79th Congress, concerning the advisability of such work being done by this Department.

MASTIN G. WHITE,  
*Solicitor.*

### STRIKES AGAINST THE GOVERNMENT

#### Federal Employees—Antistrike Affidavit.

Section 7 of the Interior Department Appropriation Act, 1947, does not require that antistrike affidavits be executed by employees of this Department. Insofar as the Appropriation Act is concerned, the execution of such an affidavit by an employee is merely provided for as a convenient method whereby he can establish his prima facie eligibility to draw his salary.

The action of the Acting Secretary of the Interior in making the execution of an antistrike affidavit a prerequisite to continued employment in this Department represented a proper exercise of the administrative authority of the Secretary.

The departmental requirement that an antistrike affidavit be executed by each employee of the Department can be waived by the Secretary in the case of a particular employee where it is otherwise clearly established that he has not struck against the Government, is not a member of an organization of Government employees that asserts the right to strike against the Government, and does not advocate, and is not a member of an organization that advocates, the overthrow of the Government by force or violence.

#### Federal Employees—Removal—Civil Service Rule XII.

In the absence of a waiver by the Secretary of the departmental requirement that an antistrike affidavit be executed by each employee of this Department, the refusal of an employee to execute the prescribed affidavit would constitute sufficient cause for a separation from the Service in accordance with Civil Service Rule XII.

M-34645

SEPTEMBER 27, 1946.

#### TO THE DIRECTOR OF PERSONNEL.

This responds to your inquiry dated August 9, which was supplemented by additional information on September 3, relative to a Bureau of Mines employee who has refused to sign the affidavit pro-

September 27, 1946

vided for in section 7 of the Interior Department Appropriation Act, 1947 (60 Stat. 348, 385).

Section 7 of the current Appropriation Act provides that—

No part of any appropriation contained in this Act shall be used to pay the salary or wages of any person who engages in a strike against the Government of the United States or who is a member of an organization of Government employees that asserts the right to strike against the Government of the United States, or who advocates, or is a member of an organization that advocates, the overthrow of the Government of the United States by force or violence: *Provided*, That for the purposes hereof an affidavit shall be considered prima facie evidence that the person making the affidavit has not contrary to the provisions of this section engaged in a strike against the Government of the United States, is not a member of an organization of Government employees that asserts the right to strike against the Government of the United States, or that such person does not advocate, and is not a member of an organization that advocates, the overthrow of the Government of the United States by force or violence: \* \* \*

On July 1, the Acting Secretary of the Interior issued a memorandum addressed to all employees of the Department of the Interior requiring the execution of an "Affidavit of Non-Affiliation." The memorandum quoted the statutory language set out above and stated that, in accordance with the requirement of the legislation, salary payments from funds available after July 1, 1946, could be made only to those employees who executed the affidavit which appeared on the reverse side of the memorandum.<sup>1</sup> The Acting Secretary also stated in the memorandum that "If you cannot make the necessary affidavit you will be relieved from duty and pay will be suspended."

Thus, it will be noted that there is no statutory requirement that antistrike affidavits be executed by employees of this Department. Insofar as the language of the Appropriation Act is concerned, the execution of such an affidavit by an employee is merely provided for as a convenient method whereby the employee can establish his prima facie eligibility to draw his salary.

On the other hand, the Acting Secretary of the Interior, in the memorandum dated July 1, made the execution of an antistrike affidavit a prerequisite to continued employment in this Department.

<sup>1</sup> The affidavit reads as follows:

"I hereby certify that I have not contrary to Section 7 of the Department of the Interior Appropriation Act of 1947, quoted on the reverse side hereof, engaged in a strike against the Government of the United States; that I am not a member of an organization of Government employees that asserts the right to strike against the Government of the United States; that I do not advocate and am not a member of an organization that advocates the overthrow of the Government of the United States by force or violence. I further certify that I have read and understand Section 7 of the Department of the Interior Appropriation Act of 1947 and I will not violate its provisions. SO HELP ME GOD."

Such a pronouncement represented a proper exercise of the authority of the head of the Department.<sup>2</sup>

As the mandatory provision with respect to the execution of the antistrike affidavit was imposed by the Acting Secretary, and is not required by the statute, it can be waived by the Secretary in the case of a particular employee where it is otherwise established that the employee has not struck against the Government, is not a member of an organization of Government employees that asserts the right to strike against the Government, and does not advocate, and is not a member of an organization that advocates, the overthrow of the Government by force or violence. Therefore, if the Bureau of Mines desires to retain the services of the employee who has refused to sign the antistrike affidavit, it would not be improper for the Bureau to request the Secretary to waive for this employee the departmental requirement relative to the execution of the affidavit. Any such request should be accompanied by factual data showing clearly the actual eligibility of the employee to draw his salary under section 7 of the current Appropriation Act.

In this connection, it should be noted that on August 27, 1946, the Comptroller General rendered a decision to the Secretary of State (26 Comp. Gen. 134, B-59635), relative to a similar antistrike provision appearing in the Government Corporations Appropriations Act, 1947. He stated that "it is mandatory that a certifying officer require a showing of fact with respect to each employee whose compensation is paid from funds made available by the subject act or any other act containing a similar provision"; and that the execution of an affidavit by the employee, "in the absence of better evidence, is a condition precedent to payment."<sup>3</sup> This emphasizes the point that a waiver of the affidavit requirement for a particular employee must be based upon factual data that are clear and convincing.

In the absence of a waiver by the Secretary of the departmental requirement with respect to an employee, the refusal of such employee

<sup>2</sup> Section 161, Revised Statutes, 5 U. S. C. sec. 22, provides that—

"The head of each department is authorized to prescribe regulations, not inconsistent with law, for the government of his department, the conduct of its officers and clerks, the distribution and performance of its business, and the custody, use, and preservation of the records, papers, and property appertaining to it."

The Interior Department affidavit form was patterned closely after that used in the Department of Agriculture. Both were decided upon prior to receipt of Civil Service Departmental Circular No. 560, of June 28, 1946, prescribing the following form:

"I, \_\_\_\_\_, do hereby swear (or affirm) that I am not engaged in any strike against the Government of the United States and that I will not so engage while an employee of the Government of the United States; that I am not a member of an organization of Government employees that asserts the right to strike against the Government of the United States, and that I will not while a Government employee become a member of such an organization."

<sup>3</sup> Also see the Comptroller General's decision dated September 18, 1946, to the Secretary of Commerce (26 Comp. Gen. 207, B-60223).

*September 30, 1946*

to execute the prescribed affidavit would constitute sufficient cause for his separation from the Service in accordance with Civil Service Rule XII. This rule provides, among other things, for the removal of persons in the classified civil service "for such cause as will promote the efficiency of the service," and outlines the procedure to be followed in effecting such removal. Section 3 of the rule provides for suspension of employees pending action under section 1. The Civil Service Commission has no jurisdiction to review the findings of a removing officer (Civil Service Act, Rules, and Regulations, Annotated, 1945, p. 283).

MASTIN G. WHITE,  
*Solicitor.*

- MARY E. HELMIG

A-24383

*Decided September 30, 1946*

**Oil and Gas Leases—Applications—Wildlife Refuge Lands—Unitization Agreements—Waiver of Rental.**

Noncompetitive oil and gas leases may properly be issued on lands within wildlife refuges, if those lands are within unit areas covered by a unit agreement and both the unit agreement and the lease protect the refuge by prohibiting oil and gas prospecting or drilling on the refuge lands except with the consent of the Secretary of the Interior. No waiver, suspension, or reduction of rentals would be granted with respect to such refuge lands on any application for such relief based on inability to prospect or drill on such lands. But noncompetitive leases will not be issued on lands necessary for the sanctuary of wildlife if such lands are not within the unit area.

**APPEAL FROM THE GENERAL LAND OFFICE<sup>1</sup>**

On October 1, 1945, Mrs. Mary E. Helmig filed an oil and gas lease application (Las Cruces 064148) for approximately 2,440.98 acres<sup>2</sup> of land in New Mexico.<sup>3</sup> By decision of June 25, 1946, the Commissioner of the General Land Office rejected Mrs. Helmig's application because all the lands applied for are within the boundaries of the Bitter Lake National Wildlife Refuge. The rejection was rested on the premises that any prospecting and drilling for oil and gas on the lands applied for, and any recovery operations following discovery of oil or gas, would frustrate the purpose, and destroy the usefulness of the refuge in providing security for wildlife and especially the birds frequenting the refuge.

In her appeal (A-24383), Mrs. Helmig stated that she had joined with other owners of or applicants for oil and gas leases in a unit plan for operation and development for oil and gas. This plan, approved

<sup>1</sup> See footnotes on p. 310.

by this Department on June 25, 1946, established the Bitter Lake Unit Area. This Unit Area covers, among other lands, 360 acres of the lands included in her application for lease, as follows:

- T. 10 S., R. 25 E., N. M. P. M., New Mexico,  
 sec. 10, SW $\frac{1}{4}$ SE $\frac{1}{4}$ .  
 sec. 11, NE $\frac{1}{4}$ NW $\frac{1}{4}$ , S $\frac{1}{2}$ NW $\frac{1}{4}$ , N $\frac{1}{2}$ SW $\frac{1}{4}$ , SE $\frac{1}{4}$ SW $\frac{1}{4}$ .  
 sec. 14, NE $\frac{1}{4}$ NW $\frac{1}{4}$ .  
 sec. 15, SE $\frac{1}{4}$ NE $\frac{1}{4}$ .

The other lands covered by Mrs. Helmig's application are outside the Bitter Lake Unit Area as approved by this Department. These lands are—

- T. 10 S., R. 25 E., N. M. P. M., New Mexico,  
 sec. 3, E $\frac{1}{2}$ , NW $\frac{1}{4}$ NW $\frac{1}{4}$ , NE $\frac{1}{4}$ SW $\frac{1}{4}$ , S $\frac{1}{2}$ SW $\frac{1}{4}$ .  
 sec. 4, E $\frac{1}{2}$ E $\frac{1}{2}$ .  
 sec. 9, SW $\frac{1}{4}$ .  
 sec. 10, N $\frac{1}{2}$ N $\frac{1}{2}$ , SW $\frac{1}{4}$ NW $\frac{1}{4}$ , NE $\frac{1}{4}$ SW $\frac{1}{4}$ .  
 sec. 11, NW $\frac{1}{4}$ NW $\frac{1}{4}$ .  
 sec. 21, SE $\frac{1}{4}$ NE $\frac{1}{4}$ , W $\frac{1}{2}$ NE $\frac{1}{4}$ , E $\frac{1}{2}$ NW $\frac{1}{4}$ , S $\frac{1}{2}$ .  
 sec. 28, N $\frac{1}{2}$ NE $\frac{1}{4}$ , NW $\frac{1}{4}$ .

The applicant pointed out that the unit agreement approved by the Secretary provides (in section 3 thereof) that no wells shall be drilled

<sup>1</sup> Effective July 16, 1946, the General Land Office and the Grazing Service were abolished and their functions were transferred to the Bureau of Land Management, by Reorganization Plan No. 3 of 1946 (11 F. R. 7875, 7876; 7776).

<sup>2</sup> These lands were as follows:

- T. 10 S., R. 25 E., N. M. P. M., New Mexico,  
 sec. 3, E $\frac{1}{2}$ , NW $\frac{1}{4}$ NW $\frac{1}{4}$ , NE $\frac{1}{4}$ SW $\frac{1}{4}$ , S $\frac{1}{2}$ SW $\frac{1}{4}$ .  
 sec. 4, E $\frac{1}{2}$ E $\frac{1}{2}$ .  
 sec. 9, SW $\frac{1}{4}$ .  
 sec. 10, N $\frac{1}{2}$ N $\frac{1}{2}$ , SW $\frac{1}{4}$ NW $\frac{1}{4}$ , NE $\frac{1}{4}$ SW $\frac{1}{4}$ , SW $\frac{1}{4}$ SE $\frac{1}{4}$ .  
 sec. 11, NW $\frac{1}{4}$ , N $\frac{1}{2}$ SW $\frac{1}{4}$ , SE $\frac{1}{4}$ SW $\frac{1}{4}$ .  
 sec. 14, NE $\frac{1}{4}$ NW $\frac{1}{4}$ .  
 sec. 15, SE $\frac{1}{4}$ NE $\frac{1}{4}$ .  
 sec. 21, SE $\frac{1}{4}$ NE $\frac{1}{4}$ , W $\frac{1}{2}$ NE $\frac{1}{4}$ , E $\frac{1}{2}$ NW $\frac{1}{4}$ , S $\frac{1}{2}$ .  
 sec. 22, SW $\frac{1}{4}$ SW $\frac{1}{4}$ .  
 sec. 27, NW $\frac{1}{4}$ NW $\frac{1}{4}$ .  
 sec. 28, N $\frac{1}{2}$ NE $\frac{1}{4}$ , W $\frac{1}{2}$ .

On February 12, 1946, Mrs. Helmig withdrew her application as to the following lands:

- sec. 22, SW $\frac{1}{4}$ SW $\frac{1}{4}$ .  
 sec. 27, NW $\frac{1}{4}$ NW $\frac{1}{4}$ .  
 sec. 28, SW $\frac{1}{4}$ .

Thus, the lands remaining in her application are as follows:

- T. 10 S., R. 25 E., N. M. P. M., New Mexico,  
 sec. 3, E $\frac{1}{2}$ , NW $\frac{1}{4}$ NW $\frac{1}{4}$ , NE $\frac{1}{4}$ SW $\frac{1}{4}$ , S $\frac{1}{2}$ SW $\frac{1}{4}$ .  
 sec. 4, E $\frac{1}{2}$ E $\frac{1}{2}$ .  
 sec. 9, SW $\frac{1}{4}$ .  
 sec. 10, N $\frac{1}{2}$ N $\frac{1}{2}$ , SW $\frac{1}{4}$ NW $\frac{1}{4}$ , NE $\frac{1}{4}$ SW $\frac{1}{4}$ , SW $\frac{1}{4}$ SE $\frac{1}{4}$ .  
 sec. 11, NW $\frac{1}{4}$ , N $\frac{1}{2}$ SW $\frac{1}{4}$ , SE $\frac{1}{4}$ SW $\frac{1}{4}$ .  
 sec. 14, NE $\frac{1}{4}$ NW $\frac{1}{4}$ .  
 sec. 15, SE $\frac{1}{4}$ NE $\frac{1}{4}$ .  
 sec. 21, SE $\frac{1}{4}$ NE $\frac{1}{4}$ , W $\frac{1}{2}$ NE $\frac{1}{4}$ , E $\frac{1}{2}$ NW $\frac{1}{4}$ , S $\frac{1}{2}$ .  
 sec. 28, N $\frac{1}{2}$ NE $\frac{1}{4}$ , NW $\frac{1}{4}$ .

<sup>3</sup> Under section 17 of the Mineral Leasing Act (41 Stat. 437, 443, as amended, 46 Stat. 1007; 46 Stat. 1523; 49 Stat. 676; 30 U. S. C. sec. 226).



September 30, 1946

"within the Bitter Lake Migratory Wildfowl Refuge \* \* \* if such land is committed hereto \* \* \* except with the consent in writing of the head of the Agency having jurisdiction over said Refuge." She indicated her willingness to accept the lease on these lands subject to the restriction that no wells would be drilled upon the Wildlife Refuge lands except to prevent drainage by offset wells, and expressed willingness to pay any compensatory royalties in accordance with the regulations of the Department.

Insofar as concerns the lands of the Wildlife Refuge which are within the Unit Area, this case is similar to that of *Bonnie H. Matlock*, A. 24375 (Las Cruces 063769), September 30, 1946, also involving wildlife refuge lands within the Bitter Lake Unit Area. With regard to such lands, the purpose of the Fish and Wildlife Service in protecting the wildlife of the refuge would be effectuated by the protection secured by the terms of the unit agreement prohibiting drilling on those lands except with the consent, in writing, of this Department and by the provisions, hereinafter set forth, to be included in this lease as in Mrs. Matlock's lease.<sup>4</sup> The lands of the Unit Area, including the Wildlife Refuge lands within the Unit Area, have been designated as comprising a block of land regarded as logically subject to development under the unitization provisions of the Mineral Leasing Act. The drilling of a test well or wells will be on land outside the refuge. No drilling will be authorized within the refuge area at this time. Should oil or gas be discovered on unitized land outside the refuge and drilling within the refuge prove to be necessary and advisable for the conservation of natural resources, no drilling will be permitted within the refuge even then except with the consent in writing of the head of the agency having jurisdiction over the said refuge and under such terms and conditions as he may deem necessary for the protection of the refuge. The above provision in the unit agreement and the hereinafter-mentioned provisions of the lease will adequately protect the Wildlife Refuge from the devastation of its prime function, while at the same time making possible the adequate unitization and development of the oil pool.

With respect to the Wildlife Refuge lands which are outside the Unit Area, however, the unit agreement provides no protection to the

<sup>4</sup> In this regard, the case is therefore unlike the case of *Lucy H. Campbell, Executrix*, A. 24313 (Great Falls 085836), June 18, 1946 (unreported), where the Department refused to issue a lease on wildlife refuge lands because the applicant desired to prospect and drill for oil and gas on wildlife refuge lands without any showing of drainage of oil from the lands of the United States, and such operations would have been detrimental to the refuge. Cases similar to the Campbell case in which lease applications were also denied are: *Arthur P. Wilcox*, A. 24042 (Great Falls 084574), June 13, 1945; *Imogene C. Brooks*, A. 23986 (Las Cruces 054519), April 9, 1945; *R. G. Folk*, A. 20601 (Las Cruces 051168), March 4, 1937 (all unreported); *J. D. Mell et al.*, 50 L. D. 308, 310 (1924).

wildlife function of the refuge. Furthermore, there is no necessity for the inclusion of these lands in the lease in order to develop the oil pool under the unitization agreement approved by this Department. This Department would not now permit prospecting for oil and gas on the refuge lands and the consequent destruction of the usefulness of the refuge as a sanctuary for wildlife. It would be pointless to issue a noncompetitive lease on Wildlife Refuge lands outside the Unit Area under which no prospecting or drilling could occur and such a lease could not effectuate the intention of the Mineral Leasing Act of February 25, 1920, as amended, which looks toward the development of the oil and gas potentialities of the land. The only conceivable purpose that could possibly be served by the issuance of a lease on these lands is the remote speculative hope that the control of the lands under an oil and gas lease, secured without competitive bidding, might possibly inure to the benefit of the lessee if, by some unlikely chance, the pool should prove to extend beyond the limits of the Unit Area so as to include these lands within a possible participating area after an enlargement of the Unit Area. There is, however, no indication that the Unit Area will ever be so extended, nor are the lands outside the Unit Area now necessary for the unitized development of the area. Should the unlikely ever happen, the Department can then consider whether the national interest in securing oil and gas production, under competitive bidding, outweighs the national importance in maintaining the Wildlife Refuge as a sanctuary for wildlife.

The Commissioner's rejection of Mrs. Helmig's application is, therefore, affirmed insofar as concerns the Wildlife Refuge lands outside the Unit Area. But with respect to the Wildlife Refuge lands within the Unit Area, the Commissioner's decision is modified and, if no other objection appears, these lands may be included in Mrs. Helmig's application and lease; but any lease issued shall specifically provide (1) that there shall be no oil or gas prospecting or any well drilling on these 360 acres except with the consent, in writing, of the Secretary of the Interior, upon advice of the Fish and Wildlife Service, and (2) that as a condition to the issuance of the lease and notwithstanding any other provisions of the lease or any provisions of the Bitter Lake Unit agreement, it is agreed that no waiver, suspension, or reduction of rentals will be granted with respect to the lands in the Bitter Lake National Wildlife Refuge on any application for such relief based on the inability of the lessee or the unit operator to prospect or drill on such lands.

C. GIRARD DAVIDSON,  
*Assistant Secretary.*

## LEASES AND REVOCABLE LICENSES ON OREGON AND CALIFORNIA REVESTED LANDS FOR RECREATIONAL PURPOSES

### O. and C. Lands—Authority of Secretary to Issue Leases and Special Land-Use Permits on O. and C. Lands for Recreational Purposes.

In the absence of specific statutory authority, Government officers have no power to lease public lands.

The act of August 28, 1937 (50 Stat. 874), does not authorize the Secretary to lease O. and C. lands for recreational purposes.

The provision of 43 CFR, Cum. Supp., 258.2 is valid, and, in the absence of congressional intent to the contrary, the issuance of special land-use permits is not restricted to cases in which there is no statute at all governing the type of use desired.

The act of April 13, 1928 (45 Stat. 429; 43 U. S. C. sec. 869a), while permitting the issuance of recreational leases on O. and C. lands to States, counties, or municipalities, does not authorize leases to individuals or business organizations.

The Secretary has authority under 43 CFR, Cum. Supp., Part 258, to issue revocable licenses for the use of O. and C. lands for recreational purposes, but only in cases in which the beneficiaries cannot qualify as lessees under the act of April 13, 1928, *supra*.

M-34331

OCTOBER 22, 1946.

### TO THE ACTING DIRECTOR, BUREAU OF LAND MANAGEMENT.

You have requested my opinion as to whether the act of August 28, 1937 (50 Stat. 874), which provides for the administration of the O. and C. lands, authorizes the Secretary to lease areas of those lands for recreational purposes, and whether the Secretary may issue revocable licenses for the use of O. and C. lands for recreational purposes.

### I

Section 1 of the act of August 28, 1937, *supra*, provides that the revested and reconveyed O. and C. lands valuable for timber shall be managed—

\* \* \* for permanent forest production, and the timber thereon shall be sold, cut, and removed in conformity with the principle of sustained yield for the purpose of providing a permanent source of timber supply, protecting watersheds, regulating stream flow, and contributing to the economic stability of local communities and industries, *and providing recreational facilities: \* \* \**  
[Italics supplied.]

By section 5 of the act the Secretary was authorized "to perform any and all acts and to make such rules and regulations as may be necessary and proper for the purpose of carrying the provisions of this Act into full force and effect."

It is a well-established principle that, in the absence of specific statutory authority, Government officers have no power to lease public

lands. Article IV, Section 3, Clause 2, of the Constitution of the United States, provides that—

The Congress shall have Power to dispose of and make all needful Rules and Regulations respecting the Territory or other Property belonging to the United States; \* \* \*.

In construing this provision of the Constitution the courts have held that Congress has exclusive jurisdiction in directing what should be done with land owned by the United States. *Irvine v. Marshall*, 20 How. (61 U. S.) 558 (1857); *Light v. United States*, 220 U. S. 523 (1911); *United States v. Nicoll*, 1 Paine 646 (1826). The Comptroller General has ruled that, as a corollary, Government officers and heads of departments lack the power to lease lands unless express authority is granted to them by statute (15 Comp. Gen. 96; 14 Comp. Gen. 169).

There is no statute conferring authority upon the Secretary generally to enter into leases of lands. Solicitor's opinion of February 25, 1944. And, specifically with respect to the leasing of O. and C. lands, I find no such authority in the act of August 28, 1937, *supra*.

The above-quoted directive of the act (section 1) that the lands be managed for the purpose, among others, of "providing recreational facilities," and the usual broad grant of power to the Secretary to make the act effective (section 5), do not constitute a sufficiently specific authority for leasing the land. The act of August 28, 1937, is not any more specific concerning the authority to enter into leases than was a certain provision of the 1936 Interior Department Appropriation Act, which was ruled upon adversely by the Comptroller General (act of May 9, 1935, 49 Stat. 176, 192; 15 Comp. Gen. 96). In that case, an appropriation of certain amounts "for conservation of health among Indians" was held by the Comptroller General not to have conferred upon the Secretary authority to lease a Government-owned sanatorium to a religious organization, to be operated for the benefit of Indian patients. On the other hand, the instances cited by the Comptroller General on another occasion (14 Comp. Gen. 169, 170) as effective authorizations to lease lands involved statutory language of a totally different nature. In all those cases, there was express authority to "rent" or to "lease" the property.<sup>1</sup>

<sup>1</sup> Thus, section 3749 of the Revised Statutes (40 U. S. C. sec. 302) authorized the General Counsel of the Treasury Department to "rent," for a period not exceeding 3 years, any unproductive lands and certain other property of the United States. By the act of March 3, 1879 (20 Stat. 383; 40 U. S. C. sec. 303a), the Secretary of the Treasury was given authority to "lease," for a period not exceeding 5 years, certain property of the United States, for the leasing of which there was no authority under existing law. The act of July 28, 1892 (27 Stat. 321; 40 U. S. C. sec. 303), conferred a similar authority upon the Secretary of War to "lease" certain property of the United States. Authority to "rent" buildings not reserved by vendors on lands acquired for building sites was granted to the Secretary of the Treasury by the act of March 4, 1909 (35 Stat. 959; 40

October 22, 1946

Accordingly, it is my opinion that the act of August 28, 1937, *supra*, does not authorize the Secretary to lease O. and C. lands for recreational purposes.

## II

You have raised the further question whether, and to what extent, the Secretary may issue revocable licenses for the use of O. and C. lands for recreational purposes. You have called attention to the fact that the act of April 13, 1928 (45 Stat. 429; 43 U. S. C. sec. 869a), which extends to the O. and C. lands the Secretary's authority<sup>2</sup> to lease public lands for recreational purposes, permits the issuance of leases to States, counties, or municipalities, and that pursuant to the provision of 43 CFR, Cum. Supp., 258.2, which is entitled "*Policy; use of lands*," special land-use permits will not be issued "in any case where the provisions of the existing public land laws may be invoked." In view thereof, you have posed the problem whether, "apart from considerations of policy," the Secretary has the "basic authority" to issue revocable licenses for a certain use only if there is no statute at all relating to that particular type of use, or whether he may issue such licenses, despite the existence of a specific statute governing that type of use, as long as the particular applicant cannot qualify under the statute.

I assume that your inquiry constitutes merely a request to consider whether special land-use permits for recreational purposes may be issued to persons who do not qualify as lessees under the act of April 13, 1928, *supra*.

Section 258.2, 43 CFR, Cum. Supp., reads as follows:

*Policy; use of lands.* It is the policy of the Secretary of the Interior, in the administration of the public lands within or outside of grazing districts, to permit, where practical, the beneficial use thereof for special purposes not specifically provided for by the existing public land laws. Permits for such special use will not be issued, however, in any case where the provisions of the existing public land laws may be invoked. For example, they will not be issued to authorize the use of the public lands for home, cabin, camp, health, convalescent, recreational, or business sites for which leases may be issued under the act of June 1, 1938 (52 Stat. 609; 43 U. S. C. 682a), or for the development of minerals, or for the securing of rights-of-way obtainable under existing laws, or for any use directly or indirectly relating to grazing.

The contemplated use must not be in conflict with any Federal or State laws.

An applicant must state in his application the use to which he intends to put the lands, and he will not be permitted to devote them to any other use, unless he secures an additional permit.

U. S. C. sec. 262). And the authority of the Secretary of the Interior conferred by the act of August 26, 1912 (37 Stat. 605; 40 U. S. C. sec. 174), in connection with the enlargement of the Capitol Grounds was to "rent" buildings or vacant land.

<sup>2</sup> Act of June 14, 1926 (44 Stat. 741; 43 U. S. C. sec. 869).

The statutory authority to issue special land-use permits for public lands is found in section 453 of the Revised Statutes (43 U. S. C. sec. 2), which provides that the Commissioner of the General Land Office shall perform, under the direction of the Secretary of the Interior, all executive duties appertaining to the surveying and sale of the public lands of the United States, or in anywise regarding such public lands. 43 CFR, Cum. Supp., 258.1; 22 Op. Atty. Gen. 240, 245; 30 Op. Atty. Gen. 470, 482. The authority to issue such permits is not limited to situations where there is no statute at all governing the particular type of use. In the absence of a congressional intent to preclude the issuance of any special land-use permits with respect to a particular kind of use,<sup>3</sup> there is no basis for thus narrowing the executive authority to issue permits. Nor has the authority been administratively restricted in that manner. For example, a special land-use permit authorizing the use of a 5-acre tract was granted, although the contemplated type of use was not different from that provided for in the Five-Acre-Tract Law (52 Stat. 609; 43 U. S. C. sec. 682a), and that statute was inapplicable only because the land had been withdrawn. *Gilbert F. Newman*, A. 23379, December 18, 1942. See, also, the case of *D. E. McDuffee*, Sacramento 035147 "K", in which the Land Office on February 8, 1944, granted a special land-use permit as a site for homes, viz, a type of use within the purview of the Five-Acre-Tract Law, *supra*, but in which the applicant was believed not to qualify under the act because the use as a home site was to be by his employees.

The regulation governing the issuance of special land-use permits<sup>4</sup> should be interpreted in accordance with the above principles. Accordingly, your question is to be answered as follows: O. and C. lands may be leased for recreational purposes under the act of April 13, 1928, *supra*, but such leases may be issued only to States, counties, or municipalities, not to individuals<sup>5</sup> or business organizations. Thus, a situation in which a recreational lease may be issued under the act of April 13, 1928, represents a case "where the provisions of the existing public land laws may be invoked." Conversely, an intended use of O. and C. land for recreational purposes, which falls outside the scope of the act of April 13, 1928, because of the character of the prospective beneficiary, is a "beneficial use thereof for special purposes not specifically provided for by the existing public land laws," within the meaning of 43 CFR, Cum. Supp., 258.2.

<sup>3</sup> Such as use of the land for the development of minerals or for grazing; see 43 CFR, Cum. Supp., 258.2.

<sup>4</sup> Special land-use permits may be issued for O. and C. lands; see General Land Office memorandum of July 15, 1941, 1708581 "F".

<sup>5</sup> The act of June 1, 1938 (52 Stat. 609; 43 U. S. C. sec. 682a), permitting leases of tracts not exceeding 5 acres to individuals for recreational sites, is not applicable to the revested O. and C. lands (43 CFR, Cum. Supp., 257.1).

*November 4, 1946*

I therefore conclude that under 43 CFR, Cum. Supp., Part 258, the Secretary has authority to issue revocable permits for the use of O. and C. lands for recreational purposes, but only in cases in which the beneficiaries cannot qualify as lessees under the act of April 13, 1928.

MASTIN G. WHITE,  
*Solicitor.*

### STATE OF ARIZONA

**A-24404***Decided November 4, 1946*

#### School Indemnity Selections—Statutory Requirements—State Compliance and Equitable Title—Effect of Taylor Grazing Act—Authority of Secretary of the Interior.

Where statutes controlling a State's selection of indemnity lands require that the selection be made from unappropriated, unreserved, nonmineral public lands under the direction and subject to the approval of the Secretary of the Interior, the State acquires no rights by the selection of lands which have already been reserved by the President for classification in accordance with their highest usefulness and which the Secretary subsequently to the State's application further reserves for classification and development as small tracts, thereby in effect denying the State's petition for restoration of the lands as suitable for indemnity selection.

The new congressional conservation policy of 1934-36, regarding the use and disposal of the public domain and the effect of the Taylor Grazing Act upon indemnity selections, considered.

#### APPEAL FROM THE GENERAL LAND OFFICE<sup>1</sup>

The State of Arizona has appealed from a decision of June 3, 1946, by the Acting Assistant Commissioner of the General Land Office holding for rejection four selections which it had filed on March 9, 1945. The rejection was made on the ground that by the Secretary's Public Land Order No. 317 of April 15, 1946,<sup>2</sup> the selected lands had been withdrawn from entry and reserved for development under the Small-Tract Law of June 1, 1938 (52 Stat. 609; 43 U. S. C. sec. 682a).

The record shows facts as follows: On March 9, 1945, the State of Arizona, acting under the authority of section 24 of the Enabling Act of June 20, 1910 (36 Stat. 557-572), filed four applications, Phoenix 081478, 081479, 081480, and 081481, to make certain indemnity selections in lieu of corresponding school lands which for various valid reasons had been lost to its school grant. The lands selected had been

<sup>1</sup> By Reorganization Plan No. 3 of 1946 (11 F. R. 7875, 7876; 7776), the General Land Office and the Grazing Service were abolished and their functions were transferred to the Bureau of Land Management, the change becoming effective on July 16, 1946.

<sup>2</sup> 43 CFR, 1946 Supp., p. 6354; 11 F. R. 4546. [Editor.]

withdrawn by Executive Order No. 6910 of November 26, 1934, from all forms of disposal and reserved for classification in accordance with their highest usefulness. Accordingly, the State, acting, as it said—

In accordance with Regulations under Section 7 of the Act of June 28, 1934 (48 Stat. 1269), as amended by the Act of June 26, 1936 (49 Stat. 1976), governing the filing of applications for entry, selection or location,

filed petitions that the Secretary classify said lands and open them for entry. On June 3, 1946, the Land Office rejected the applications on the ground of the withdrawal of April 15, 1946, for the small-tract project.

The State appealed, setting forth its grounds in a notice filed on July 26, 1946, and in an argument and a memorandum of authorities filed on July 29, 1946. The grounds stated were—

1. That the said applications are indemnity selections, and are not governed by any order or rule made under Section 7, or any other section of the Taylor Grazing Act, whether as originally enacted or as amended.

2. That from and after the date of the filing of the said indemnity applications, and the acceptance thereof by the Local Land Office, there was no authority in the Secretary of the Interior subsequently, by public land order or otherwise, to withdraw from the selection or right to select the lands described for the purposes mentioned in or under the Act of June 1, 1938, 43 U. S. C. sec. 682-a, as amended, or under any other act, rule or regulation.

Pointing out that its selections were school indemnity selections made under section 24 of the Enabling Act, the State contended that with the filing of the applications title to the selected lands vested in the State and could not be defeated by any subsequent action on the part of the Land Commissioner or the Secretary of the Interior such as the withdrawal for the small-tract project. *Payne v. New Mexico*, 255 U. S. 367 (1921), and *Wyoming v. United States*, 255 U. S. 489, 494 (1921). It argued that equitable title to the lands had passed to the State on March 9, 1945, when the applications were filed, and that therefore the lands thereupon ceased to be the "vacant, unreserved public land" contemplated by the Small-Tract Act and by Public Land Order No. 317, *supra*, and could not be affected by either. The State further argued that the selections must be adjudicated in accordance with the law and the facts existing at the time when the selections were filed and insisted that the Department had no alternative but to reverse the Land Office decision.

Of the Enabling Act quoted by the State, relevant portions provide as follows:

~~Sec. 24. That in addition to sections sixteen and thirty-six, heretofore~~<sup>3</sup> reserved for the Territory of Arizona, sections two and thirty-two in every

<sup>3</sup> Rev. Stat. sec. 1946; act of September 9, 1850 (9 Stat. 453, 457). See *Byers v. State of Arizona*, 52 L. D. 488, 490 (1928).



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township in said *proposed* State not otherwise appropriated at the date of the passage of this Act are hereby granted to the said State for the support of common schools; and where sections two, sixteen, thirty-two, and thirty-six, or any parts thereof, are mineral, or have been sold, reserved, or otherwise appropriated or reserved by or under the authority of any Act of Congress, \* \* \* *the provisions of sections twenty-two hundred and seventy-five and twenty-two hundred and seventy-six of the Revised Statutes, and Acts amendatory thereof or supplementary thereto, are hereby made applicable thereto and to the selection of lands in lieu thereof to the same extent as if sections two and thirty-two, as well as sections sixteen and thirty-six, were mentioned therein: \* \* \*. [Italics supplied.]*

\* \* \* 4 \* \* \*

SEC. 29. That all lands granted in quantity, or *as indemnity*, by this Act, shall be selected, *under the direction and subject to the approval of the Secretary of the Interior, from the surveyed, unreserved, unappropriated, and nonmineral public lands of the United States within the limits of said State \* \* \*. [Italics supplied.]*

Sections 2275 and 2276 of the Revised Statutes,<sup>4</sup> just mentioned as being here applicable, were later amended by the act of February 28, 1891 (26 Stat. 796). As amended, these sections appear in the United States Code as sections 851 and 852 of Title 43. The portions here relevant are as follows:

§ 851. \* \* \* other lands of equal acreage are also appropriated and granted, and may be selected by said State or Territory where sections 16 or 36 are mineral land, or are included within any Indian, military, or other reservation, or are otherwise disposed of by the United States: \* \* \*.

§ 852. **Selections to supply deficiencies of school lands.** The lands appropriated by section 851 of this title shall be selected from any *unappropriated*, surveyed public lands, not mineral in character, within the State or Territory where such losses or deficiencies of school sections occur; \* \* \*. [Italics supplied.]

These quotations make abundantly clear as to the lands here permitted to be appropriated as indemnity that neither under the provisions of the Enabling Act nor under those of the Revised Statutes, whether in their original form or in their amended version, does title pass by virtue of the statutes alone. They show that various conditions precedent must be duly met, among them the statutory prescriptions as to the base lands and as to the character, quantity, and location of the selected lands and the Secretary's directions calling for certain fees, affidavits, certificates, and proofs.<sup>5</sup> It has long been settled, however, that upon complete performance in due form of all the acts which the statutes and the directions of the Secretary require the State to perform in order to perfect its selection, equitable

<sup>4</sup> Sections 2275 and 2276 originally constituted the act of February 26, 1859 (11 Stat. 385), sometimes called the *general indemnity act*. See Thomas E. Watson, 6 L. D. 71, 73 (1887).

<sup>5</sup> See 43 CFR 270.1 *et seq.*

title will pass to the State and cannot be affected by any subsequent discovery of minerals or by any subsequent executive attempt to reserve the selected tracts under the authority of the act of June 25, 1910 (36 Stat. 847). *Payne v. New Mexico*, 255 U. S. 367 (1921); *Wyoming v. United States*, 255 U. S. 489 (1921); *Slade v. Butte County*, 14 Calif. App. 453, 112 Pac. 485, 486 (1910).

Relying on the *Payne* and *Wyoming* decisions, the State declares that it had fully complied with the statutes and the regulations of June 23, 1910 (39 L. D. 39; 43 CFR 270.1 *et seq.*), and that equitable title passed to it on March 9, 1945, with the filing of its selections; that thereupon the selected lands ceased to be vacant, unappropriated, and unreserved lands and therefore were unavailable for small-tract development or for the withdrawal of April 15, 1946.

The State's contention as to the withdrawal of April 15, 1946, would be correct if the State could establish the full compliance with statutory conditions precedent which it alleges. But this it cannot do, for the lands which the State selected on March 9, 1945, were not *unappropriated, unreserved* lands as required by the controlling statutes above quoted. During more than 10 years the selected lands had been withdrawn from any form of disposal and at no time between November 26, 1934, and March 9, 1945, had they been restored to the public domain. The State's application papers recognized this fact, for they included the petition above mentioned requesting that the Secretary classify the lands and open them for entry in accordance with the regulations described in the petition. (See 43 CFR 296.1-296.13.) Thereby the State implicitly recognized that unless the Secretary granted the petition the State could not complete its selection and acquire the lands. In its appeal papers, however, the State in effect repudiates its earlier action and, ignoring the facts of record, misapplies the very rules regarding indemnity selections which it quotes from the *Payne* and *Wyoming* decisions.

In its argument on appeal, the State overlooks the important chapter in public-land history dating from the passage of the Taylor Grazing Act of June 28, 1934 (48 Stat. 1269), and the effects of that act on indemnity selections. By that statute the Congress initiated a new policy regarding the public domain, its use and disposal, a policy looking to the conservation of the Nation's natural resources. Section 1 of the act provided for the withdrawal from all forms of entry of all public lands within the exterior boundaries of proposed grazing districts. In addition, in order to further the new policy and promote effective administration of the Taylor Act, the President, acting under the authority of the act of June 25, 1910 (36 Stat. 847), as amended, issued Executive Orders Nos. 6910 and 6964 on November 26, 1934, and February 5, 1935, respectively, making general withdrawal of all

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vacant, unreserved, and unappropriated public lands in 24 States<sup>6</sup> and reserving them for classification in accordance with their highest usefulness and for the conservation and development of natural resources, subject to existing valid rights.

Section 7 of the Taylor Act authorized the Secretary to classify such lands in grazing districts as might be more valuable for the production of agricultural crops than for native grasses and forage plants and to open them to homestead entry, but it made no provision for the classification and restoration of the withdrawn lands for any other purpose. Nor was any provision anywhere made for the restoration of lands not withdrawn by virtue of their inclusion within grazing districts but withdrawn by Executive Orders Nos. 6910 and 6964. It resulted that despite the Enabling Act and the Revised Statutes above quoted, permitting indemnity lands to be taken for school sections lost, no indemnity land was to be obtained. The whole public domain had been appropriated and reserved by the withdrawals and could be opened only for homestead entry. See *State of Arizona*, 55 I. D. 249, 253 (1935), and Solicitor's opinion of February 8, 1935, 55 I. D. 205.

This unprecedented situation could not be allowed to continue. By act of June 26, 1936 (49 Stat. 1976; 43 U. S. C. sec. 315f), the Congress amended section 7 of the Taylor Grazing Act to permit the classification of withdrawn lands suitable for uses other than homestead entry and their restoration to the public domain for disposal in accordance with such classification under the appropriate public-land laws.

Among the provisions of this amendment was one authorizing the Secretary *in his discretion* to classify and open to entry, selection, or location any withdrawn lands "proper for acquisition in satisfaction of any outstanding *lieu*, exchange or script rights or land grant." Thereby, after an interval of 2 years during which no outstanding *lieu* rights could be satisfied, it once more became possible for the States to obtain school indemnity lands but only by following the procedure outlined by section 7 of the Taylor Grazing Act and the Secretary's regulations thereunder,<sup>7</sup> in addition to complying with all the earlier laws and regulations governing the indemnity selection applied for.

It is further to be noted that under section 7, as amended, no substantive rights whatever can be acquired by any applicant unless the Secretary shall give to the lands sought the classification requested. The section expressly provides that the withdrawn lands "shall not be subject to disposition, settlement, or occupation until after the

<sup>6</sup> The order affecting Arizona lands was No. 6910.

<sup>7</sup> Circ. 1353b, June 29, 1937, 43 CFR 296.1-296.13.

same have been classified and opened to entry." This provision testifies conclusively to the congressional intent of 1936 that a suitable classification of land should thenceforth be the indispensable condition precedent to any disposal of any portion of the public domain in continental United States.

Obviously, in view of the facts recounted, there is no merit in the State's contention that its indemnity selections are not governed by anything in the Taylor Grazing Act and that title to the lands has already passed to the State. The lands here sought by the State as indemnity must be classified and opened to entry by the Secretary before the selection may be perfected by the State and allowed by the manager. *State of California*, Los Angeles 055141 "F", January 15, 1943 (unreported). See 43 CFR, Cum. Supp., 270.7, and 43 CFR 270.11. In the absence of classification and restoration of the lands, the lands remain appropriated and reserved for the purposes of the withdrawal, and the State is in the position of not having complied with the very first requirement of the Enabling Act and the general indemnity act, namely, that it select unappropriated, unreserved lands, and of being unable to perfect its selection "in full conformity with the act and the directions of the Secretary." *Wyoming v. United States*, *supra*, syllabus, at p. 490.

In this case, the Secretary has not classified these lands as proper for the State's selection. Instead, after long consideration of the best use to be made of a certain area of Arizona land embracing the tracts here sought, the Secretary decided that the lands studied should be reserved for development in small tracts under the act of June 1, 1938 (52 Stat. 609; 43 U. S. C. sec. 682a), as amended. Accordingly, on April 15, 1946, the Secretary issued Public Land Order No. 317, withdrawing these and other lands for that purpose, subject to existing valid rights.<sup>8</sup> In effect, therefore, the Secretary has denied the State's petition for an indemnity classification and has reserved the lands for classification and development as small tracts. This the Secretary had full authority to do, the State's pending selection application having given the State no rights under any law which would prevent the new withdrawal from attaching.

It is to be noted that by its terms Public Land Order No. 317 takes precedence over but does not modify the withdrawal by Executive Order No. 6910 of November 26, 1934. It results that while the lands affected remain withdrawn for development under the Small-Tract Law, they are not subject to applications for classification under other public-land laws in accordance with section 7. On the other hand,

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<sup>8</sup> The Secretary acted under the authority of the act of June 25, 1910 (36 Stat. 847; 43 U. S. C. secs. 141-143), as amended, and Executive Order No. 9337 of April 24, 1943 (3 CFR, Cum. Supp., p. 1274).

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should Order No. 317 be revoked or modified, any land released from it would immediately become subject to the withdrawal of November 26, 1934.

As to the lands selected in Phoenix 081481, it should be noted that the land described as T. 15 S., R. 12 E., G. & S. R. B. & M., Arizona, sec. 11, E<sup>1</sup>/<sub>2</sub>, has been known during the past 60 years as valuable for its mineral deposits. It would, therefore, not be subject to selection by the State under the statutes above cited.

The decision by the Acting Assistant Commissioner is affirmed.

C. GIRARD DAVIDSON,  
*Assistant Secretary.*

**WILLIAM AHRENS (DECEASED, CATHERINE AHRENS, ADMINISTRATRIX), L. E. GRAMMER, CARL H. BEAL, OPERATORS**

**A-24228**

*Decided November 26, 1946*

**Mineral Leasing Act—The Alaska Oil Proviso—Waiver of Rental.**

To the extent that section 22 of the Mineral Leasing Act limited the discretion of the Secretary of the Interior to waive the rental on oil and gas leases in Alaska to the first 5 years of such leases, it has been superseded by section 39 of that act, which, among other things, authorizes the Secretary to waive rental or minimum royalty on oil and gas leases whenever in his judgment it is necessary to do so in order to promote development, or an oil and gas lease cannot be successfully operated under the terms provided therein.

**APPEAL FROM THE GENERAL LAND OFFICE<sup>1</sup>**

L. E. Grammer and Carl H. Beal, operators under the unit plan of operation for the Hubbell Dome Area, Alaska, have appealed (A-24228) from a decision by the Commissioner of the General Land Office. In connection with their application (Anchorage 010609) to secure a preference-right oil and gas lease based on a previous oil and gas lease (Anchorage 08216), the Commissioner's decision made certain requirements, including a demand for payment of the rental for the first year on lease, Anchorage 010609. Separately and apart from their application, the applicants had filed a request for waiver of rentals on the new lease, but the Commissioner took no note of the request in his decision. The appeal requests that the rental be waived for the first 5 years of the preference-right lease and asks that the part of the Commissioner's decision requiring the payment of rental be reversed.

<sup>1</sup> Effective July 16, 1946, the General Land Office and the Grazing Service were abolished and their functions were transferred to the Bureau of Land Management, by Reorganization Plan No. 3 of 1946 (11 F. R. 7875, 7876; 7776).

The previous lease was a 5-year exchange lease, on which section 13 of the Mineral Leasing Act (41 Stat. 437, 441; 49 Stat. 674) required no rental during the first 2 years and on which the Secretary waived the rentals for the last 3 years under section 22 of the act (41 Stat. 437, 446; 30 U. S. C. sec. 251). The Commissioner took no cognizance of the application for waiver of rental. But even if he had, he would necessarily have denied it in view of existing departmental decisions. See *Frank Harold Johnson*, April 28, 1945, and A. 24204, October 24, 1945 (unreported). These decisions had held that the Secretary was without authority to waive the rentals on preference-right oil and gas leases of public lands in Alaska applied for under the act of July 29, 1942 (56 Stat. 726; 30 U. S. C. sec. 226b), if the lessee had paid no rentals for 5 years during his original lease term. That holding was premised on the provision of section 22 of the Mineral Leasing Act<sup>2</sup> authorizing the Secretary to waive the rentals or royalties on Alaskan leases, but "not exceeding the first five years of any lease." While on this appeal the appellants do not expressly raise the question, they may be regarded as in effect asking the Secretary to overrule these decisions. However, the August 8, 1946, amendment to section 39 of the Mineral Leasing Act (60 Stat. 950, 957) makes it unnecessary even to consider the question.

The request for a waiver of rental may now be deemed to invoke that amendment of section 39.<sup>3</sup> As amended, that section now authorizes the Secretary to waive the rental or minimum royalty whenever in his judgment it is necessary to do so in order to promote development, or an oil and gas lease cannot be successfully operated under the terms provided therein. The section concludes: "The provisions of this section shall apply to all oil and gas leases issued under this Act \* \* \*."

The quoted language could hardly be made more inclusive. And when related to the express purpose of the section, "encouraging the

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<sup>2</sup>"\* \* \* for the purpose of encouraging the production of petroleum products in Alaska the Secretary may, in his discretion, waive the payment of any rental or royalty not exceeding the first five years of any lease." [41 Stat. 437, 446; 30 U. S. C. sec. 251.]

<sup>3</sup>"The Secretary of the Interior for the purpose of encouraging the greatest ultimate recovery of coal, oil, or gas and in the interest of conservation of natural resources is authorized to waive, suspend, or reduce the rental, or minimum royalty, or reduce the royalty on an entire leasehold, or on any tract or portion thereof segregated for royalty purposes, whenever in his judgment it is necessary to do so in order to promote development, or whenever in his judgment the leases cannot be successfully operated under the terms provided therein. In the event the Secretary of the Interior, in the interest of conservation, shall direct or shall assent to the suspension of operations and production under any lease granted under the terms of this Act, any payment of acreage rental or of minimum royalty prescribed by such lease likewise shall be suspended during such period of suspension of operations and production; and the term of such lease shall be extended by adding any such suspension period thereto. The provisions of this section shall apply to all oil and gas leases issued under this Act, including those within an approved or prescribed plan for unit or cooperative development and operation."

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greatest ultimate recovery of \* \* \* oil," there can be little doubt that the section is intended to embrace any oil and gas lease issued under the Mineral Leasing Act, regardless of whether the lands involved are in Alaska or in one of the States.

Moreover, the application of section 39, as amended, to Alaskan oil and gas leases accords with a long-standing policy of the Congress. The Congress has recognized that oil and gas exploration in Alaska is beset with difficulties not usually encountered in the States. The transportation of equipment and machinery to Alaska entails a substantial cost which is further enhanced by the often intricate problem of moving the machinery and equipment from the coast to the exact spot where the exploration is to be conducted. Complicating all of this is the factor of the weather, which not infrequently restricts Alaskan drilling operations to a relatively short period in each year.

In an apparent effort to lighten these burdens of the Alaskan oil and gas lessee, section 22 of the original Mineral Leasing Act, *supra*, permitted the waiver of rentals during not more than the first 5 years of any Alaskan lease, when no waiver was accorded to lessees of oil lands in the States. Now section 39 not only provides for the waiver of rentals on leases, but without limitation as to time, and this new provision obviously is applicable at the very minimum to leases of lands in the States. To continue to hold, however, that section 22 now bars Alaskan lessees from obtaining the full benefits of section 39, as amended, would defeat the general purpose of the Congress in enacting the 1946 amendments to the Mineral Leasing Act and the expressed purpose of section 39, as amended. More, for no apparent reason, it would place the Alaskan lessee at a competitive disadvantage as compared with lessees in the States when in fact, as Congress has long recognized, if anything the Alaskan lessee is entitled to more favorable treatment. Such a construction would be unreasonable and unjust and should be avoided. *Cf. Sorrells v. United States*, 287 U. S. 435 (1932), and cases cited. Accordingly, in the absence of any indication that Congress intended to reverse its policy of 25 years standing with respect to Alaskan lessees, and there is none, we hold that section 39, as amended, has superseded section 22 with respect to waivers of rentals.

Whether a waiver should be granted in the immediate case is a matter to be determined by testing the effects of the requested waiver against the criteria of section 39 and the requirements of the regulations issued thereunder (43 Code of Federal Regulations 191.25).

The decision of the Commissioner is modified, and the case is remanded to the Bureau of Land Management which will afford the applicants an opportunity to furnish information in support of their

application under section 39 of the Mineral Leasing Act, as amended, *supra*, and the pertinent regulations (43 CFR 191.25). On the basis of the information furnished, if any, together with all other relevant information in the file of this case, the Bureau will dispose of the application for waiver of rental in accordance with this decision.<sup>4</sup>

OSCAR L. CHAPMAN,  
*Acting Secretary.*

**EQUITY OIL COMPANY, UTAH SOUTHERN OIL COMPANY,  
THE CALIFORNIA COMPANY**

**A-24273**

*Decided December 2, 1946*

**Mineral Leasing Act—Oil and Gas Leases—Acreage Charges.**

In computing the acreage to be charged against the holder of operating rights limited to deep sands underlying an oil and gas lease, the Department will not consider the sands, horizons, or the depth or cubic content of the interest embraced but will look only to the areal extent of such deep sands.

**APPEAL FROM THE GENERAL LAND OFFICE<sup>1</sup>**

The Equity Oil Company and Utah Southern Oil Company held in equal, undivided shares all of the operating rights in oil and gas leases, Denver 032703 (a) and (b), 033720, and 032675-044860, subject to royalty obligations to the lessees in the amounts of 2½ and 7½ percent. By an operating agreement dated July 8, 1943, approved by the Department on April 29, 1944, the two companies conveyed to The California Company 78 percent of their operating rights in sands below 2,500 feet. They retained a 22 percent interest in these deep sands and all of their rights in sands above that level.

On January 24 and June 23, 1945, in response to inquiries from the attorneys for The California Company as to the manner of charging acreage to the Company, the Commissioner of the General Land Office ruled that no division of the acreage charge would be made on the basis of a horizontal division of interest, that in this instance The California Company would be charged with 78 percent of 97½ percent of the total acreage in certain of the leases and with 78 percent of 92½ percent of the total interest in the other leases, re-

<sup>4</sup> There is no question here of the retroactive application of section 39 since, under departmental instructions of July 8, 1946, any preference-right lease which may be issued in this case will be dated as of the first of the month following its execution by the Department.

<sup>1</sup> Effective July 16, 1946, the General Land Office and the Grazing Service were abolished and their functions were transferred to the Bureau of Land Management, by Reorganization Plan No. 3 of 1946 (11 F. R. 7875, 7876; 7776).



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gardless of the fact that the Company's interest in all of the leases is limited to sands below the 2,500-foot level. The Company appealed.

For purposes of discussion, the rights of others in these leases may be ignored and the situation treated as though The California Company held the total operating rights in the deep sands and its assignors the total rights in the shallow sands. The California Company contends that this arrangement operates to divide each leased area into two portions and that in computing the acreage charged to it under section 27 of the Mineral Leasing Act (41 Stat. 437, as amended; 30 U. S. C. sec. 181 *et seq.*), the total leased acreage should first be divided in half (shallow sands and deep sands) and then the acreage of The California Company computed upon only one-half of the total leased area. The Company points out that heretofore where the Government has issued leases for an area of only 2,560 acres to one person on one structure, a subsequent vertical division of the acreage into two equal parts between two persons has resulted in a charge of only 1,280 acres to each person. Where the same tract is divided horizontally, as in this case, The California Company contends that the same rule of computation should apply. In support of this contention, it points out that failure to divide the acreage charge as between the holder of the upper and of the lower sands would result in charging each with holding 2,560 acres, or a total charge of 5,120 acres in an instance where the Government has leased not more than 2,560 acres. Essentially, the Company seeks to have its acreage charge measured by dividing the areal extent in terms of acres which it controls in one sand or horizon, by the total number of known sands or horizons into which the lease has been split by operating agreements.

But in measuring and delimiting the extent of the interest of any person in an oil and gas lease, the Mineral Leasing Act has always referred to acreage, without regard for "sands" or "horizons."<sup>2</sup> And, in keeping with the terms of the act, the Department has never computed acreage charges upon the basis of "sands" or "horizons," nor has it ever had regard for the depth or cubic content of the interest embraced. Numerous amendments to the act have given no indication that the Congress has desired that the Department consider sands or horizons for the purposes of such computation.<sup>3</sup> Indeed, the fact

<sup>2</sup> The act originally fixed limitations as to each lease by reference to acreage and then limited the number of leases in which a person might have an interest within the geologic structure of a single producing oil and gas field and within a single State (41 Stat. 448). Later amendments eliminated consideration of the number of leases in which one person might have an interest and fixed the limitation solely by reference to interests in acreage within the geologic structure of a producing oil and gas field and within a single State. (44 Stat. 373; 46 Stat. 1008; 46 Stat. 1524; 60 Stat. 950, 954, sec. 6.)

<sup>3</sup> See, e. g., the amendments cited in footnote 2.

is that over a period of more than 25 years, the Congress has in effect acquiesced in the conclusion of the Department that sands or horizons are not to be considered in the computation of acreage charges; such acquiescence may be taken as recognition of the correctness of the Department's procedures in this respect.<sup>4</sup>

The purpose of measuring and limiting the acreage held by a person or other entity, of course, is to prevent tendencies toward monopoly in the production of oil and gas. If the contentions of the appellant were to be adopted, the salutary result contemplated by the statutory limitation of acreage could be readily avoided, and a single lessee, by adroit division of his interest upon horizontal planes, could undertake the control of a vast area of a particularly rich sand. This was not contemplated by the statute. The act contemplates that within a single State no person shall have an interest in the oil and gas underlying more than 15,360 acres.<sup>5</sup> It is true, as the Company suggests, that this may give to some lessees the control of oil-bearing sands at several levels. But, however deep one may drill, however many the productive sands he may penetrate and develop, he is unable under the statute to monopolize any sand which extends horizontally beyond the perpendicular extension of the boundaries of one or more tracts totaling 15,360 acres in one State. Recognition of the intendment of the rule is persuasive that the contention of the Company be rejected. *Cf. Producers and Refiners Corporation et al.*, 53 I. D. 155 (1930).

The decision of the Commissioner is affirmed.

C. GIRARD DAVIDSON,  
*Assistant Secretary.*

#### ADMINISTRATION OF INDIAN TRIBAL AND INDIVIDUAL LANDS THROUGH LEASING CLERK EMPLOYED BY TRIBAL LAND ENTERPRISE

Leases and Permits—Grazing and Farming Leases and Permits—Delegation of Ministerial Functions to Indian Tribes as Instrumentalities of the United States—Provision for Tribal Enterprises under Annual Appropriation Act—Authority of Tribal Leasing Clerk—Construction of section 3679 of the Revised Statutes (Now 31 U. S. C. sec. 665).

An Indian tribe, whether incorporated or unincorporated, may take over, through a tribal leasing clerk, the clerical and ministerial details involved in the leasing of tribal and individual lands.

<sup>4</sup> *Cf. Norwegian Nitrogen Products Company v. United States*, 288 U. S. 294, 313-315 (1933).

<sup>5</sup> Section 27, *supra*, as amended (60 Stat. 950, 954, sec. 6).

*December 6, 1946*

The clerical and ministerial details which would be involved in the leasing and permitting of Indian lands are not prescribed by most of the leasing statutes. To the extent that they are prescribed, they may nevertheless be delegated to an Indian tribe, which for this purpose may be regarded as an instrumentality of the United States. The express statutory power of the Secretary of the Interior to establish tribal enterprises under appropriate regulations, which exists under the annual Appropriation Act, further supports such delegation.

Insofar as the Department has a function to perform in connection with the leasing and permitting of Indian lands, the indirect benefit to the Department from the activities of the tribal leasing clerk would not contravene section 3679 of the Revised Statutes, as amended by the act of February 27, 1906 (34 Stat. 27, 48; 31 U. S. C. Sec. 665), which provides that officers of the Government shall not accept voluntary services.

DECEMBER 6, 1946.

TO THE COMMISSIONER OF INDIAN AFFAIRS.

In connection with the attached application\* of the Fort Belknap Indian Community for a loan of revolving credit funds in the amount of \$225,000, of which \$125,000 are to be devoted to the establishment and operation of a tribal land purchase enterprise, you have requested the opinion of this office on the question whether this Indian tribe, through a tribal leasing clerk, may take over the clerical work involved in the leasing of individual and tribal lands, and the assessment of fees for the performance of this work. The leasing fees would eventually be deposited locally to the credit of the land enterprise, and would be used to meet its expenses.

Apparently the money needed to pay the salary of the tribal leasing clerk is to be provided initially by using \$1,800 of tribal industrial assistance funds now on deposit in the United States Treasury. It is stated in the detailed plan of operation of the tribal land enterprise: "The \$1,800 received from Tribal Industrial Assistance funds will be repaid to an appropriate tribal account" (p. 7). It seems that once the \$1,800 has been repaid to this account from leasing fees, all further deposits would be made in "the Fort Belknap Indian Community tribal account at Fort Belknap Agency" (p. 7). The schedule of fees would coincide "with those now authorized in the Secretary of the Interior's regulations."

What precisely is meant by the "clerical" work to be done by the tribal leasing clerk is not entirely clear from the plan. Would the leasing clerk merely prepare the papers and attend to other details? Or would he also execute the lease on behalf of the lessor, whether an individual or the tribe? In a teletype message dated October 10,

\*The application referred to may be found in the files of the Bureau of Indian Affairs. [Editor.]

however, the information has been supplied that the lands would continue to be leased in accordance with the grazing and leasing regulations, which require approval of any lease by some officer of the Department. Thus, the tribal clerk would perform only the task of preparing the papers and attending to other details.

I shall first consider the question of the authority to employ tribal industrial assistance funds in the United States Treasury to pay the salary of the tribal leasing clerk in the initial stage of the operation of the enterprise. Since 1945, the annual Appropriation Act has carried a provision making tribal funds available in tribal enterprises, in accordance with the Revolving Credit Regulations, whether or not the tribal enterprises are conducted by tribes that have organized and incorporated under the Indian Reorganization Act. In practical terms this has meant that revenues derived from enterprises operated with tribal funds advanced to unincorporated tribes need no longer be covered into the Treasury, but may be used as a revolving fund, as when advances are made to incorporated tribes. Thus the current Appropriation Act (60 Stat. 348, 362) provides:

\* \* \* That funds available under this paragraph [i. e., tribal industrial assistance funds] may be used for the establishment and operation of tribal enterprises when proposed by Indian tribes and approved under regulations prescribed by the Secretary: *Provided further*, That enterprises operated under the authority contained in the foregoing proviso shall be governed by the regulations established for the making of loans from the revolving loan fund authorized by the Act of June 18, 1934 (25 U. S. C. 470) \* \* \*.

This provision makes no distinction between administrative and other expenses in the conduct of a tribal enterprise. It would also seem to be immaterial that the tribal leasing clerk would assist in leasing individual as well as tribal lands, if he is otherwise authorized to do so. Presumably each individual owner would normally give his consent to the leasing of his land in this manner and would thus entrust managerial functions to the enterprise. The enterprise, however, would be no less tribal in character because it would involve participation in the management of individual lands.

Thus, there would seem to be nothing in the provision of the current Appropriation Act upon the subject which would prevent the advance of tribal funds to pay the salary of the tribal leasing clerk in the initial phase of the operation of the enterprise. It is necessary, however, to consider also the effect of the act of March 1, 1933 (47 Stat. 1417; 25 U. S. C. sec. 413), which provides:

That the Secretary of the Interior is hereby authorized, in his discretion, and under such rules and regulations as he may prescribe, to collect reasonable fees to cover the cost of any and all work performed for Indian tribes or for individual Indians, to be paid by vendees, lessees, or assignees, or deducted from the proceeds of sale, leases, or other sources of revenue: *Provided*, That the amounts so col-

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lected shall be covered into the Treasury as miscellaneous receipts, except when the expenses of the work are paid from Indian tribal funds, in which event they shall be credited to such funds.

This act does not in itself prevent a tribal body or any other body from collecting leasing fees, nor does it even require the Secretary to collect fees for the performance of work in connection with the management of Indian resources. The legislative history of the act, which may be gathered from Senate Report 1204, 72d Cong., 2d sess. (1933), shows that it had two purposes:

1. To amend the act of February 14, 1920 (41 Stat. 408, 415), which made the collection of fees mandatory.
2. To require fees for work paid for from Indian tribal funds to be credited to such funds.

Any possible conflict between this statute and the provision of the current Appropriation Act would seem to be avoided by that feature of the plan for the tribal enterprise which calls for the deposit of leasing fees in the local tribal treasury only after the amount of the advance has been repaid into the United States Treasury. The necessity for such repayment, however, will undoubtedly hamper the operation of the leasing program, and render more difficult the problem of meeting the salary of the leasing clerk. I should point out, therefore, that consideration should be given to the possibility of eliminating the immediate repayment of the advance of tribal industrial assistance funds into the United States Treasury. In a memorandum of December 4, 1944, this office held that the provision of the 1942 Appropriation Act (55 Stat. 303, 316), which required the repayment into the United States Treasury of the revenues derived from the operations of the Navajo sawmill, was in effect superseded by the provision of the 1945 Appropriation Act with reference to the advance of tribal industrial assistance funds to tribal enterprises, which did not require such repayment. While there is a general rule of statutory construction to the effect that a special statute will not be presumed to be superseded by one of general operation, the rule yields to evidence of a contrary intention, and such evidence was found in the legislative history of the 1945 Appropriation Act, which clearly showed that it was the intention to establish a uniform system in the use of tribal industrial assistance funds in tribal enterprises. This reasoning would seem to be wholly applicable to the construction of the act of March 1, 1933. The amounts collected in fees would not have to be repaid at once into the United States Treasury but could be retained to pay the salary of the tribal leasing clerk.

It has also been objected that the tribal leasing clerk could not participate in the leasing of tribal or individual lands because he would be performing a Government function. So far as the tribal lands are

concerned, this view is obviously untenable. An incorporated tribe, such as the Fort Belknap Indian Community, clearly has authority to lease such lands, and therefore may employ a tribal leasing clerk. Section 1 of its charter declares that one of the purposes for which the corporation has been formed is "to provide for the proper exercise by the Community of various functions heretofore performed by the Department of the Interior." Section 5 (b) of the charter contains the provision authorized by section 17 of the Indian Reorganization Act (48 Stat. 988; 25 U. S. C. sec. 477), which confers upon the Community "the power to purchase, take by gift, or bequest, or otherwise, own, hold, manage, operate, and dispose of property of every description, real and personal," except that no sale, mortgage, or lease for a period exceeding 10 years may be made. While subdivision (b) (2) of the same section subjects leases to the approval of the Secretary of the Interior, this limitation is derived from the charter itself, and may be terminated at any time by the Secretary of the Interior upon the request of the Community Council and upon submission of the question of termination to the members of the Community, or by a two-thirds vote of the Community even over the objection of the Secretary of the Interior. (Charter, sec. 6.) It was the purpose of the charter to vest the administration of tribal property in the Community Council; the requirement of Secretarial approval in certain cases was intended only as a temporary safeguard; and the mere existence of this provision does not render the leasing process a governmental function which may be performed only by civil-service employees. (See memorandum of Acting Solicitor Kirgis to Commissioner of Indian Affairs, dated May 22, 1937.) I assume that the leases will still be approved by the Community Council and the Secretary of the Interior, as required by the Community charter. There is no reason, however, why the details of the transaction may not be entrusted to the tribal leasing clerk.

A somewhat more difficult problem is presented, however, by the participation of the tribal leasing clerk in the leasing of individual lands. The charter of the Fort Belknap Indian Community does not expressly enlarge in any way the powers of the Community Council in dealing with lands which are individually owned. It must be determined, therefore, whether the activities of the tribal leasing clerk would be in harmony with the provisions of Federal law governing the leasing of individual lands. I need consider only the provisions governing the leasing of individual lands for farming and grazing purposes. No other types of lease would presumably be made in connection with the operations of the tribal land enterprise. The individual lands involved would be lands allotted under the act of March 3, 1921 (41 Stat. 1355), or possibly lands purchased pursuant to the

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provisions of the Indian Reorganization Act. In either case, the lands would be held under trust patents.

The statutes authorizing leases differ in many respects. The statutes which would have a bearing on farming and grazing leases are the acts of March 3, 1921 (41 Stat. 1232; 25 U. S. C. sec. 393), May 18, 1916 (39 Stat. 128; 25 U. S. C. sec. 394), May 31, 1900 (31 Stat. 229; 25 U. S. C. sec. 395), June 25, 1910 (36 Stat. 856; 25 U. S. C. sec. 403). The authority to lease under each of these statutes varies in one or more respects: the circumstances under which the lands may be leased; the type of lands that may be leased; the purpose for which the lands may be leased; the length of the term of the lease; the making of the lease; and finally the approval of the lease. The making and approval of the lease are particularly significant factors in connection with the present problem, and the most general, and hence important, statutes are the acts of June 25, 1910, and March 3, 1921. Under the latter, restricted allotments may be leased for farming or grazing purposes by *the allottee or his heirs* subject to the approval of the Superintendent under such rules and regulations as the Secretary of the Interior may prescribe, while under the former allotted lands held in trust may be leased by *the allottee* for any purpose in conformity with such rules and regulations as the Secretary of the Interior may prescribe. There is no express statutory authority for leasing lands purchased for individual Indians pursuant to the Indian Reorganization Act, but it is not clear whether there is any intention to lease such lands.

This Department has held that a trust of restricted Indian funds whereby a commercial trust company would take over the management of the trust estate could not be created even with the approval of the Secretary of the Interior who had control of the restricted funds (Op. Sol., M. 25258, approved June 26, 1929). The Attorney General came to the same conclusion in an opinion dated October 5, 1929 (36 Op. Atty. Gen. 98). These opinions seem to rest upon the theory that the control of restricted funds is a Government function which the Secretary could not delegate to agencies outside of his Department in the absence of express statutory authority even though he might remove altogether the restrictions upon the funds. The canon against the delegation of *legislative* authority to nongovernmental agencies, which was enunciated by the Supreme Court in *Schechter Corp. v. United States*, 295 U. S. 495, 537 (1935), has been repeated by the Court in *Carter v. Carter Coal Co.*, 298 U. S. 238, 310 (1936), although it has not been applied in subsequent cases such as *Sunshine Coal Co. v. Adkins*, 310 U. S. 381, 399 (1940); *Currin v. Wallace*, 306 U. S. 1, 15 (1939), or *Yakus v. United States*, 321 U. S. 414,

424 (1944), where the question was essentially whether Congress could make the execution of a statutory scheme dependent upon some action by a private group. *A fortiori*, if a legislative body may not delegate its legislative functions to an outside agency, an administrative body may not thus rid itself of administrative responsibility imposed by statute.

A proposal to "delegate" to the Southern Ute Tribal Council the Department's authority under the act of March 1, 1933, *supra*, to charge fees to cover the cost of preparing tribal grazing permits was considered in a memorandum of this office dated March 28, 1939. It was suggested that the delegation could be made under section 2 of Article V of the Southern Ute constitution, which provided that the Tribal Council might exercise "such further powers as may be delegated to the Southern Ute Tribe by the Secretary of the Interior." It was pointed out that since the council had authority itself to issue the permits, it could undoubtedly charge fees to cover the cost of the work. There was thus no real problem of delegation. Doubt was, however, expressed that the Secretary could delegate his power to charge fees under the act of March 1, 1933, in a case in which the power of disposition was vested in him.

These opinions are perhaps the basis of the view expressed in your office that "tribal employees cannot assist in transcribing leases and permits, posting accounts, etc., which tasks are supposed to be Government functions to be performed by civil service employees only." This view may be considered in the light of various alternative theories.

In the first place, the leasing statutes do not impose any particular ministerial requirements. The authority to lease restricted lands, whether held in trust or subject to restrictions against alienation, is granted actually to the allottees or their heirs. Presumably they will normally consent to the making of the leases and the payment of the leasing fees. While the authority to lease is subject to a regulatory power in the Secretary, and in the case of restricted allotments the approval of the Superintendent is expressly required, it does not necessarily follow that every step in a leasing transaction must be regarded as a Government operation. Since the plan for the Fort Belknap tribal land enterprise contemplates that whatever approval is required by the statutes or regulations will be given by the appropriate officers of the Federal Government, there would seem to be no serious problem of delegation of Government authority to any "outside agency."

Certainly there would be no delegation of any discretionary duty of the Government officers in leasing allotted lands. The tribal clerk would perform purely ministerial duties in connection with the leasing of such lands which hitherto have been performed by a Government



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clerk in accordance with the existing regulations. But the statutes themselves do not require the transcribing of leases or the posting of accounts any more than they prescribe that the Secretary shall manufacture his own paper, typewriters, and ink. The performance of "Government functions" becomes involved in mysticism if it is contended that statutory requirements are violated when an "outside agency" performs purely mechanical or ministerial acts.

Moreover, if the allottee may lease the land, he may himself prepare the lease and attend to other details. He is required only to submit the lease to the proper Government officer, who is usually the Superintendent. What the allottee may do for himself, he may do through the tribal leasing clerk. Even the posting of accounts is not a necessary and integral part of a statutory scheme. Section 4 of the act of June 25, 1910, *supra*, does provide that the proceeds of any lease "shall be paid to the allottee or his heirs, or expended for his or their benefit, in the discretion of the Secretary of the Interior." But the Secretary may and in fact had allowed competent allottees at least to collect and retain the rentals, as well as to negotiate their own leases (25 CFR 171.4).

The leasing of inherited allotments presents a more difficult problem. The act of July 8, 1940 (54 Stat. 745; 25 U. S. C. sec. 380), provides that restricted allotments of deceased Indians may be leased by reservation superintendents, subject to departmental regulation, when the heirs or devisees have not been determined, or if determined, they are not making use of the lands, and have failed to agree upon a lease during a 3 months' period. The proceeds are required to be credited to the estates or accounts of those entitled thereto. Under this statute, the power of disposition is undoubtedly vested in a Government officer and the occasion for its exercise is of frequent occurrence. The inability to secure adequate consent may exist also in the case of incompetent allottees or heirs. The mechanical details of leasing such lands are, however, not prescribed by the statutes, and the approval required by the statute or regulations would in any event be given. Since it is concluded below that a tribal leasing clerk would not be an outside agency, such cases, too, would not seem to present an insuperable obstacle. It is not clear from the plan, however, just how the proceeds would be handled in such cases by the tribal leasing clerk.

No bar to the proposed scheme would seem to be interposed by section 3679 of the Revised Statutes, as amended by the act of February 27, 1906 (34 Stat. 27, 48; 31 U. S. C. sec. 665), which provides: "Nor shall any department or any officer of the Government accept voluntary service for the Government \* \* \*." It may be argued that even though the services are not required by the statutes, and are not

therefore "governmental" in nature, the Department would be taking advantage of the services in performing the necessary function of review or approval. This indirect benefit, however, would not seem to contravene the statute. Moreover, the Attorney General has held (30 Op. Atty. Gen. 51, 55) that "the evil at which Congress was aiming was not appointment or employment for authorized services without compensation, but the acceptance of unauthorized services not intended or agreed to be gratuitous and therefore likely to afford a basis for a future claim upon Congress." In any event, the statute would not have the effect of invalidating any lease in connection with which "voluntary" services had been accepted.

The problem thus far has been discussed upon the assumption that a government of an Indian tribe is vis-à-vis the Federal Government, an "outside agency." Actually, an Indian tribal government can hardly be regarded in the same way as a private commercial trust company. It has been held that Indian tribes may impose on Indian Service employees the duty of enforcing the laws and ordinances of the tribe. See Cohen, "Handbook of Federal Indian Law," pp. 149-150. While these cases involved permit laws of one or the other of the Five Civilized Tribes in Oklahoma, and hence the application of the Curtis Act, the courts seem to have recognized the possibility of delegation upon general principles. So, too, the Department has held that an incorporated Indian tribe may delegate to an Indian Service employee the performance of ministerial functions in the preparation and execution of a lease. The Department has also assumed in a letter dated April 17, 1945, to the Superintendent of the Flathead Agency that an Indian tribal government is a "municipality" in the sense in which the term is employed in section 1 of the act of March 3, 1917 (39 Stat. 1106; 5 U. S. C. sec. 66), so that an Indian tribal government could contribute to the salary of an Indian Service employee without violating the prohibition of the statute. Conversely, it has been recognized in at least one instance by statute that the Secretary of the Interior might give to the proper authority of a tribe the direction of persons employed by the Government in their behalf. (See Rev. Stat. sec. 2072, now 25 U. S. C. sec. 48.) While this statute would not afford the basis for the solution of the present problem, since the leasing clerk would not be a Government employee unless he continued to be paid from gratuity or tribal funds, the possibility of making such a delegation without endangering vital governmental interests would seem to be apparent. In fact, the Department, even in the absence of express statutory provision, has generally assumed that it may delegate to an Indian tribal government the "sole" power, pursuant to section 5 of the act of August 15, 1876 (19 Stat.

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200; 25 U. S. C. sec. 261), to appoint traders to the Indian tribes. If Indian tribal courts may be regarded as disciplinary agencies of the Department, rather than as agencies of the tribes, then it may be said that the Department has frequently delegated its authority to particular tribal courts. Indeed, the constitutions adopted by tribes under the Indian Reorganization Act generally contain a standard clause providing that the governing body of the tribe may exercise such powers as may in the future be delegated to it by the Secretary of the Interior. While this provision does not, of course, determine the extent of permissible delegation, it is evidence of the expectation of making such delegations.

It must be apparent that in their relations with each other the Federal Government and an Indian tribe do not regard each other as alien sovereignties. Power has flowed in both directions, and this could have occurred only if it be assumed that an Indian tribal government may in fact be regarded as an instrumentality of the United States. See Cohen, "Handbook of Federal Indian Law," pp. 275-276, and authorities there cited. The tribes are dependent upon the United States and the United States owes to them not only the duty of protection but also the services of civilization. There would seem to be no better means of promoting this civilizing process than by encouraging to the greatest possible extent, consistent with statutory provisions, the management by the tribes themselves of their own resources. Certainly there need be little hesitancy in concluding that, at least so long as the Department retains general control of the leasing process, it may delegate to a tribal government its purely ministerial aspects.

This conclusion may be accepted the more readily in view of the fact that the functions would be performed in connection with the operations of a tribal enterprise, which the Secretary has been given express statutory authority to establish. It is not unreasonable to suppose that this express statutory permission enlarges the scope of the Secretary's power, especially since he also possesses a general rule-making power in this connection. If the Secretary is convinced that greater efficiency or economy would be produced in the management of a tribal land enterprise by permitting it also to assist in the leasing of individual lands, his statutory authority to regulate the enterprise should enable him to produce this desirable result.

While the question presented has been occasioned by the plans for the Fort Belknap Tribal Land Enterprise, it is the desire of your office that it be considered also with reference to the powers of an unincorporated tribe. While the powers of disposition of tribal resources possessed by an unincorporated tribe are less extensive than those of an incorporated tribe, this factor would limit primarily the

extent of tribal lands subject to leasing. The act of February 28, 1891 (26 Stat. 795; 25 U. S. C. sec. 397), permits tribal grazing leases only when lands are occupied by Indians "who have bought and paid for the same," including lands held by aboriginal occupancy recognized by treaty or some form of agreement. The act of August 15, 1894 (28 Stat. 305; 25 U. S. C. sec. 402), permits only the leasing of the "surplus lands of any tribe" for farming purposes. Both statutes provide, however, that the leases may be made by the councils of the tribes. As was said in *White Bear v. Barth*, 61 Mont. 322, 203 Pac. 517 (1921), in referring to the statute authorizing tribal grazing leases, "From the language of this statute it appears reasonably certain that it was the legislative purpose to confer primary authority upon the Indians, and that the determination of the council should be conclusive upon the government, at least in the absence of any evidence of fraud or undue influence." The 1891 act provides for the approval of any lease by the Secretary of the Interior, while the 1894 act provides that the leases may be made "under the same rules and regulations" as in the case of leases for grazing purposes. The act of July 3, 1926 (44 Stat. 894; 25 U. S. C. sec. 402a), provides that the "unallotted irrigable lands on any Indian reservation may be leased for farming purposes" with the consent of the governing body of the tribe under such rules and regulations as the Secretary of the Interior may prescribe.

Since an unincorporated tribe may no less be an instrumentality of the United States than an incorporated tribe, and may establish tribal enterprises upon the same basis as an incorporated tribe, there would seem to be no objection to the performance by the leasing clerk of purely ministerial functions in the leasing of tribal lands, or to retaining the leasing fees in the tribal enterprise. The views expressed with reference to allotted lands are equally applicable to an unincorporated tribe, since the powers of even an incorporated tribe in the management of such lands are no greater.

While I am of the opinion that a tribal leasing clerk may take over the ministerial duties in connection with the leasing of tribal and individual lands, whether or not the tribe is incorporated, it seems to me that the details of his activities and of the plan for the operation of the tribal land enterprise as a whole are lacking in clarity, despite the additional information that has been secured by this office since the documents were submitted. It is, for instance, not clear just how the tribal leasing clerk will function in relation to nonconsenting and incompetent owners. The form in which consent to the leasing of lands will be given by individual owners is also obscure. It is provided, for instance, in paragraph 4, page 8, of the Detailed Plan of Operation that a landowner shall have a right of appeal from the decision of an appraisal board. Does this mean that he has agreed

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in advance to abide by the appraisal? It is not even entirely clear from the detailed plan of operation that the leasing of individually owned lands would necessarily be involved in the conduct of the proposed Fort Belknap Tribal Land Enterprise. At page 27 of exhibit H of the loan application it is stated: "Only land purchased or otherwise acquired by this enterprise will be included in the enterprise." The purchased land would, of course, become tribal land.

The present regulations governing the issuance of grazing permits and the leasing of tribal and allotted lands were designed to govern the activities of Government employees acting under the general supervision of the Department. In view of the substitution of tribal leasing clerks for Government leasing clerks, it would seem to be necessary, however, that further consideration be given to the question whether the regulations themselves should not be modified. I suppose that you have considered the extent of the additional financial burden upon the Government which will result from the elimination of the leasing fees hitherto collected. I assume, of course, that it is not intended to charge double leasing fees, although the Government will continue to review permits and leases as heretofore.

Apart from the foregoing difficulties, I am concerned at the level of payments contemplated in the land-purchase program. I doubt that the Fort Belknap Community can afford, if this is to be considered an economic proposition, to pay an average of \$2.50 per acre for surface rights to land bringing a gross income of 10 cents per acre and still meet the contemplated repayment schedule and take care of its costs of operation, including the expenses of fencing, lease operations, and collections, all of which are entirely omitted from the schedule in the "Detailed Plan of Operation of Fort Belknap Indian Community Tribal Land Enterprise," at pages 13-14. I note also that the financial and property statement in exhibit E places a valuation on all the tribal agricultural and grazing lands of \$2 an acre. The grazing lands alone, then, must be appraised at less than this amount, particularly since the tribe would be purchasing only surface rights, as it already owns the minerals (41 Stat. 1355).

It appears to me that an undertaking to pay individual Indians 25 times the average gross annual income of their lands (which would often amount to 50 times the net income) is likely to build up a land-selling drive among these Indians, and perhaps, by contagion, among other Indian groups as well. Such a drive would probably (1) create many false hopes; (2) impose upon tribal and agency authorities an invidious burden of selection among would-be sellers; (3) break down alternative methods of land consolidation set out in the constitution of this Community, such as the exchange assignment system;

and (4) nullify the effects of years of education as to the importance of holding, rather than selling, lands. These dangers could be forestalled to some extent by seeing that no more than a fair price, in terms of appraisals giving due weight to prospective net income to the seller, is paid for lands which the tribe may purchase.

Thus, while I am prepared to recommend the approval of the loan application and the revocable permit of the submarginal lands, I think that your office should assume the responsibility for approving the detailed plan of operation. If the regulations themselves are modified, it will, of course, be necessary for you to submit the amended regulations for departmental approval.

MARTIN G. WHITE,  
*Solicitor.*

### GRAZING FEES UNDER THE TAYLOR GRAZING ACT

#### Taylor Grazing Act—Basis of Fixing Grazing License and Permit Fees.

The Taylor Grazing Act authorizes the Secretary to fix fees for grazing licenses and grazing permits upon any basis determined by him to be reasonable in the light of the purposes of the act, which are to stop injury to the public range by overgrazing and soil deterioration, to provide for their orderly use, improvement, and development, and to stabilize the livestock industry dependent upon the public range. The cost of administration of the act is a factor which may be considered in fixing fees, but it is not the controlling factor.

M-34766

DECEMBER 20, 1946.

TO ASSISTANT SECRETARY DAVIDSON.

In your memorandum of November 14, you asked for my views on the question whether the Taylor Grazing Act <sup>1</sup> "contemplates that the grazing fee shall cover the value of the forage or only the cost of administration."

I take it that your inquiry is broadly directed to the nature and extent of the authority conferred by the act upon the Secretary to fix grazing fees in the case of both permits and "temporary" licenses (which were issued prior to the time when the Department began the issuance of permits and which are still outstanding in substantial numbers); and your question will be answered accordingly.

#### I

I shall discuss first the question of grazing license fees.

Sections 2 and 3 of the Taylor Grazing Act (43 U. S. C. secs. 315a, 315b) provide, in part, as follows:

<sup>1</sup> Act of June 28, 1934 (48 Stat. 1269, as amended; 43 U. S. C. sec. 315 *et seq.*).

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SEC. 2. The Secretary of the Interior shall make provision for the protection, administration, regulation, and improvement of such grazing districts as may be created under the authority of the foregoing section, and he shall make such rules and regulations and establish such service, enter into such cooperative agreements, and do any and all things necessary to accomplish the purposes of this Act and to insure the objects of such grazing districts, namely, to regulate their occupancy and use, to preserve the land and its resources from destruction or unnecessary injury, to provide for the orderly use, improvement, and development of the range; \* \* \*

SEC. 3. That the Secretary of the Interior is hereby authorized to issue or cause to be issued permits to graze livestock on such grazing districts to such bona fide settlers, residents, and other stock owners as under his rules and regulations are entitled to participate in the use of the range, upon the payment annually of reasonable fees in each case to be fixed or determined from time to time \* \* \*. During periods of range depletion due to severe drought or other natural causes, or in case of a general epidemic of disease, during the life of the permit, the Secretary of the Interior is hereby authorized, in his discretion to remit, reduce, refund in whole or in part, or authorize postponement of payment of grazing fees for such depletion period so long as the emergency exists: \* \* \*.

In 1936, 2 years after the passage of the Taylor Grazing Act, the Department adopted regulations which provided that until grazing permits could be issued under section 3 of the act, temporary licenses would be issued under section 2. Holders of licenses were required to pay grazing fees of 5 cents per month per head of cattle or horses and 1-cent per month per head of sheep or goats. (Rules for Administration of Grazing Districts, approved March 2, 1936; see 43 CFR 501.1, 501.16.)

The regulations were promptly attacked, and in ensuing litigation the United States District Court in Nevada and the Supreme Court of that State held the fee provisions to be invalid. *United States v. Achabal*, 34 F. Supp. 1 (1940); *Brooks v. Dewar*, 106 P. (2d) 755 (1940). Their reasoning was the same, the *Brooks* decision citing the *Achabal* case. Assuming that the Secretary had authority under section 2 to issue temporary licenses and to charge license fees, the courts held that such fees must be fixed in accordance with the rule which would govern the fixing of permit fees under section 3, that is, the fees must be "reasonable in each case." They held that the uniform fees prescribed in the regulations did not accord with this standard because grazing areas varied materially in value due to differences in the forage cover, climatic conditions, topography, and other such factors, and therefore uniform fees applicable to all areas could not be reasonable when applied in each separate case.

The *Brooks* decision was reversed by the United States Supreme Court. *Brooks v. Dewar*, 313 U. S. 354 (1941). Pointing out that Congress, with knowledge that the Department was issuing temporary licenses and was charging uniform fees therefor, had repeatedly ap-

propriated part of the receipts for expenditure on range improvements, the Court held that the repeated appropriations not only confirmed the Department's construction of section 2 but constituted ratification of the action of the Secretary as the agent of Congress in administering the act. Upon the strength of the Supreme Court decision, the *Achabal* case was also reversed (122 F. (2d) 791 (C. C. A. 9th, 1941)).

Whatever the significance of these decisions with respect to the immediate question may be, this much seems clear: the State court and the Federal district court assumed that the Secretary was to adjudge the reasonableness of license and permit fees upon the basis of the grazing value offered. The courts said nothing about relating such fees to costs of administration. The Supreme Court found it unnecessary to pass upon this assumption in view of its holding that Congress had ratified the action of the Department in charging uniform fees. It does seem significant that in the only judicial discussion of the act with reference to the fixing of grazing fees, there was no mention of costs of administration as a controlling factor. Furthermore, the fees sustained by the Supreme Court apparently bore no relation to costs of administration. Cattle and horses were charged 5 cents a head, sheep and goats 1 cent per head. The differential in fees seems totally unrelated to the administrative cost of furnishing grazing facilities and services for the various species. Congress, in ratifying the charging of these fees, presumably had no thought that the fees were to be based upon the expense of administration.

It is my opinion that the Taylor Grazing Act does not limit the amount which may be charged for grazing license fees to the administrative costs under the act or require the fees to be fixed on such basis, but that the act permits the fees to be fixed in any amount and upon any basis determined by the Secretary to be reasonable in the light of the purposes of the act, which are to stop injury to the public grazing lands by overgrazing and soil deterioration, to provide for their orderly use, improvement, and development, and to stabilize the livestock industry dependent upon the public range.<sup>2</sup>

## II

I am of the same opinion with respect to grazing permit fees. That conclusion is supported, I think, by the language of section 3 and the legislative history of the act, as well as by the cases just discussed.

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<sup>2</sup> See the title of the act and section 2 (43 U. S. C. sec. 315a). See, also, H. Rept. No. 903, 73d Cong., 2d sess. (1934), p. 2, and S. Rept. No. 1182, 73d Cong., 2d sess. (1934), pp. 2-3; *United States v. Achabal*, 34 F. Supp. 1 (D. C. D. Nev., 1940).



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Section 3 provides for "reasonable fees in each case to be fixed or determined from time to time \* \* \*." This language seems to contemplate that fees may be varied according to the circumstances of particular cases, a process which is inconsistent with the pegging of fees to costs of administration. Section 3 further provides that fees may be remitted, reduced, refunded, or postponed during periods of range depletion due to severe drought or other natural causes or in case of a general epidemic of disease. The idea seems implicit in this provision that fees are to be related to the value of the grazing privileges to a permittee, for the cost of administration would not fluctuate directly or necessarily with the amount of forage available to a permittee or the number of livestock which he might have for grazing. It is significant, too, that section 10 of the act (43 U. S. C. sec. 315i), which provides for the disposition of receipts, does not allocate any part of fees received for the express purpose of paying costs of administration. This contrasts with the distribution in section 10 of 50 percent of the proceeds received to the States in which grazing districts are situated, to be used for the benefit of the counties producing the receipts, and the apportionment of 25 percent of the proceeds to be used, when appropriated by Congress, for the construction, purchase, or maintenance of range improvements. The remaining 25 percent simply goes into the Treasury as miscellaneous receipts, and appropriations for administrative costs are made from the general fund.<sup>3</sup>

The legislative history bears out the conclusion previously stated. The Taylor Grazing Act was introduced in the Seventy-third Congress as H. R. 6462. Practically the same bill had been introduced in the preceding Seventy-second Congress as H. R. 11816, and H. R. 6462 was expressly recognized as being the same legislation.<sup>4</sup> As drafted in H. R. 11816, section 3 of the bill for all practical purposes contained the same language as that quoted above from section 3 of the act.<sup>5</sup> H. R. 11816, as explained in an exhaustive and detailed memorandum of the Forest Service which was submitted with the report of the Department of Agriculture on the bill (H. Rept. No.

<sup>3</sup> See, for example, Interior Department Appropriation Acts for 1943 (56 Stat. 506, 507); 1944 (57 Stat. 451); 1945 (58 Stat. 463); 1946 (59 Stat. 318, 322); and 1947 (60 Stat. 348, 351).

<sup>4</sup> H. Rept. No. 903 on H. R. 6462, 73d Cong., 2d sess. (1934), p. 3; report of Department of the Interior on H. R. 6462, dated June 2, 1933, incorporated in H. Rept. No. 903, p. 5; Hearings on H. R. 2835 and 6462, House Public Lands Committee, 73d Cong., 1st and 2d sess. (1933), (1934), p. 12.

<sup>5</sup> The only differences in the first sentence were the use in H. R. 11816 of "homesteaders" in place of "bona fide settlers," the omission from the bill of "in each case" after "reasonable fees," and the inclusion in the bill of "under his authority" after "from time to time"; and the only difference in the second sentence was the omission from the bill of "for such depletion period" after "fees."

1719, 72d Cong., 1st sess., 1932), was drafted by the Departments of Agriculture and Interior with the cooperation of Representatives Colton and French. The Forest Service memorandum contains this thorough and highly significant discussion of section 3:

Section 3 gives to the Secretary of the Interior specific authority for the issuance of grazing permits to stock owners entitled to the use of the range either as individuals, groups, or associations, such permits to be for a period of not to exceed 10 years, but subject to renewal, in the discretion of the Secretary, upon payment of reasonable annual fees to be determined by the Secretary. Your attention is also specifically called to the following language which is incorporated in the section:

"During periods of range depletion due to severe drought or other natural causes, or in case of a general epidemic of disease during the life of the permit, the Secretary of the Interior is hereby authorized, in his discretion, to remit, reduce, refund in whole or in part, or authorize postponement of payment of grazing fees so long as the emergency exists."

Some effort was made to work out and embody in the bill some principle for the establishment of fees, or a statement of the rate or rates to be charged under given conditions. This was found to be impractical. What would be reasonable under one set of circumstances would be unreasonable and excessive under another. After all, it was believed to be best to leave this to the discretion of the Secretary of the Interior, with the provision, however, that fees "must be reasonable." The departmental representatives, of course, realize that a fee which would be reasonable on improved and stabilized range would be unreasonable if applied to a depleted, injured, or impoverished range; also that a fee which would be reasonable in a district where all allotments have been worked out and are stabilized, with carrying capacity and seasonal use determined and understood, would be excessive on a range where these problems still required adjustment. It thus becomes obvious that the rates which may be charged on the public domain must at the outset be much more moderate than those now charged on the national forests, just as the fees originally charged on the national forests when the ranges were being brought under administration, allotments determined, and carrying capacity and seasonal use worked out, were only a fraction of what they are today. Finally, it is realized that underlying the entire system must be this basic economic principle that the user of the range must be given conditions and terms of use which will enable him to secure for his labor and capital invested a return at least equivalent to that earned by the labor and capital of other stockmen who own or lease lands in private ownership. The natural workings of economic forces, therefore, thus establishes a maximum beyond which a higher fee is destructive both to the livestock industry and to the accomplishment and purposes of the district. *Administrative costs do not provide a satisfactory yardstick.* If a fee covering such cost fails to allow the permittee an economic opportunity equivalent to that of his competitors using privately owned or leased land, it must be reduced to a rate which will allow that opportunity, and any additional costs must be borne by the general public. Upon the other hand, on a district having more favorable conditions the same fee might give the permittees an economic opportunity entirely out of line with that enjoyed by his competitors. This illustrates the need of complete coordination of fees based upon the actual value to the permittees, to the end that the returns from the better range may make it possible to rehabilitate the poorer ranges and deal justly with all the permittees

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without imposing an unnecessary burden upon any permittees or upon the general public.

It would be unfair to the members of your committee if I should lead you to conclude from the foregoing that it would be possible to satisfactorily extend such a system of grazing districts over a large part of the now-unregulated public domain, and at the same time have the system from the outset self-supporting. I do not believe that it is practical to do this and at the same time secure the hearty support and approval of the livestock industry in the West. Even if economic conditions should be immediately reestablished upon the basis which we have been accustomed to consider "normal," with the higher prices, better credit conditions, and more hopeful spirit which accompanied such normal times, it would still be unreasonable to expect the stockmen to pay a substantial fee for the use of the public ranges of the West in their present condition. Fees must be paid from profitable returns and there cannot be profitable returns in any great volume until overgrazing is stopped, basic improvements for orderly use provided, and allotments and satisfactory plans of range management worked out. I am sure, however, that the stockmen will be found willing to contribute immediately toward such improvements and betterments generally from labor in a generous degree. The growth of the establishment of districts and the extension of this system under present depressed conditions will naturally be slow, but some advancement is better than no progress. Furthermore, the first necessary steps would be taken in building a trained organization and getting the experience which would be of tremendous value in speeding up progress when conditions return to normal. [*Italics supplied.*]

This excerpt seems to establish beyond much question that the draftsmen of section 3 in H. R. 11816 had in mind the fixing of fees in relation to the value to stockmen and rejected administrative costs as a yardstick.<sup>6</sup> In the absence of clear evidence to the contrary, it may be argued that in eventually adopting this language, Congress had the same intention.

The only evidence throwing doubt upon this conclusion is the fact that in testifying before the House and Senate Public Lands Committees on H. R. 6462, on behalf of this Department, Secretary Ickes and Assistant Solicitor Poole asserted that the Department expected to derive from the act "just the expense of operation. We are not trying to make any money out of it."<sup>7</sup> "We have no intention of making this a revenue producer at all. We would like for the range to pay for its own administration but nothing more."<sup>8</sup> "We have stated repeatedly it was not the intention of the Department to make

<sup>6</sup> That this intent was carried over into H. R. 6462 is demonstrated not only by the fact that H. R. 6462 was expressly recognized as being the same legislation as H. R. 11816, but also by the fact that in addition to employing practically the same language in section 3 (see footnote 5, *supra*), the author of H. R. 6462 added the following italicized words in the phrase: "upon the payment annually of reasonable fees *in each case* to be fixed or determined from time to time." As already pointed out, the concept of a fee which would vary according to the circumstances of a case is incompatible with the notion of a fee fixed on the basis of administrative costs.

<sup>7</sup> Secretary Ickes, Hearings on H. R. 2835 and 6462, p. 16; see footnote 4, *supra*.

<sup>8</sup> Secretary Ickes, Hearings on H. R. 6462, Senate Public Lands Committee, 73d Cong. 2d sess. (1934), p. 15.

this a revenue-producing measure.”<sup>9</sup> Nothing else of significance on the question was said in the hearings or in the debates on the measure.

The most that may be said of the testimony of Secretary Ickes and Assistant Solicitor Poole is that it evidenced an administrative intent to exercise the discretionary authority to charge “reasonable fees” in such a manner that the receipts would not exceed the cost of administering the act. Their statements did not purport to construe section 3 as limiting the authority of the Secretary in the fixing of reasonable fees. Consequently, the statements seem to furnish no basis for inferring a congressional intent to limit fees to the costs of administration or to require that fees be fixed upon that basis.

In practice, grazing permit fees have been charged at the same rates as license fees, and in no year during the period of the collection of fees has the total revenue from this source paid into the Treasury as miscellaneous receipts even approached the costs of administration. Consequently, it can reasonably be said that there has been an administrative construction that fees need not be based upon costs of administration. Since Congress has continued to make appropriations from receipts for range-improvement purposes, it may also be said, under the reasoning in the *Brooks* case, that Congress has approved this administrative construction.

### III

For the foregoing reasons, and as previously indicated, it is my opinion that section 3 of the Taylor Grazing Act authorizes the imposition of any fees which are reasonable in view of the broad purposes of the act. The cost of administration, of course, is a factor which may be considered, but it is not the controlling factor. It does not fix either a floor or a ceiling with respect to grazing fees.

MASTIN G. WHITE,  
*Solicitor.*

## JURISDICTION OF FLATHEAD TRIBAL COUNCIL TO REGULATE HUNTING ON PABLO AND NINEPIPE RESERVOIR SITES

Indian Tribe—Jurisdiction to Regulate Hunting in Reservoir Areas—  
Surplus Lands—Withdrawals as Reservoir Sites—Construction of  
Reservoirs.

The Flathead Tribal Council does not have jurisdiction to regulate hunting within the Pablo and Ninepipe Reservoir areas. The reservoir areas are part of the surplus lands opened to settlement and entry pursuant to the

<sup>9</sup> Assistant Solicitor Poole, *ibid.*, p. 103.

*January 3, 1947*

act of April 23, 1904 (33 Stat. 302) ; and the act of March 3, 1909 (35 Stat. 796), expressly authorized the reservation of lands within the Flathead Reservation chiefly valuable for reservoir sites. The selection of such sites and their use for reservoir purposes amounted to the taking by the United States of such an interest in the lands as to be inconsistent with the continued jurisdiction of the tribe to regulate hunting in the reservoir areas.

M-34739

JANUARY 3, 1947.

## TO THE COMMISSIONER OF INDIAN AFFAIRS.

On August 23, 1946, the Tribal Council of the Confederated Salish and Kootenai Tribes enacted Resolution No. 574, authorizing the tribal field man and tribal secretary to mark off a public shooting lane at the Pablo and Ninepipe Reservoirs for use by both Indians and non-Indians. This resolution was approved by Superintendent Wright on August 26 and transmitted to the Department for review. Assistant Secretary Gardner telegraphed Superintendent Wright on October 25 to advise the council that, while the Department took the position that the resolution was not subject to departmental review, action by the members of the tribe in accordance with the resolution might subject them to the risk of prosecution. It was suggested, therefore, that the council await the reconsideration of the legal question by the Department. Another resolution was adopted by the tribal council on October 24 to amend and modify the earlier resolution. It appropriated tribal funds to secure bonds or to meet other expenses in the event of an arrest arising from hunting on the refuges and limited the use of the shooting lane to Indians. You have requested my opinion on the question whether the tribal council has authority to regulate hunting in the Pablo and Ninepipe Reservoir areas.

The lands underlying the Pablo and Ninepipe Reservoirs are part of the surplus lands of the Flathead Indian Reservation, which was created by the treaty of July 16, 1855 (12 Stat. 975), ratified by the Senate and proclaimed by the President on April 18, 1859.

The act approved April 23, 1904 (33 Stat. 302), directed the allotment of the Flathead Reservation and opened the surplus unallotted lands to settlement and entry. The United States was to act as trustee in the disposal of the surplus lands and to pay the net proceeds to the Indians as received, or use the proceeds for their benefit. Part of the proceeds was to be used in the construction of irrigation facilities.

The act of May 29, 1908 (35 Stat. 448, 450), provided that the white settlers were to pay irrigation charges but that the Indians were to

have a "right to so much water as may be required" to irrigate their lands without cost to them.

By the act of March 3, 1909 (35 Stat. 796), the Secretary of the Interior was expressly authorized to reserve any lands within the Flathead Reservation "chiefly valuable for power sites or reservoir sites." On February 19, 1910, the Bureau of Reclamation requested the Secretary to reserve and set aside certain sites for such purposes, including among them the sites of the Pablo and Ninepipe Reservoirs. These reservations were approved by the Secretary on February 23, 1910. Both reservoirs had been constructed by 1912 (House Hearings on Indian Appropriation Bill for 1914, pp. 70-73) with funds appropriated by Congress (39 Stat. 139).

By the act of May 18, 1916 (39 Stat. 123, 141), Congress refunded tribal funds which had been expended for a part of the construction of the project and placed such funds to the credit of the tribes. Less than one-fourth of the land in the project is now owned by Indians (Handbook of Federal Indian Law, p. 251). Although the Bureau of Reclamation constructed the project, it is now under the jurisdiction of the Bureau of Indian Affairs.

In order to protect the bird life on these reservoir sites, the Department suggested to the Secretary of Agriculture that they be set aside as bird refuges. In its letter of April 24, 1915, the Department stated that the Flathead Tribe through its business committee had recommended such action. In accordance with the wishes of the tribe, the Department of Agriculture was invited to investigate the advisability of establishing the refuges. Again, in 1917, a similar letter was submitted to the Secretary of Agriculture indicating that the Flathead Business Committee had renewed its request that the reservoirs and lakes of the Flathead Reservation be established as bird refuges. The Superintendent of the Agency had advised the Department that he believed bird life could be amply protected by the Indians and the members of the Indian and Reclamation Services. Accordingly, in 1921, two proposed Executive orders setting up such refuges on the Pablo and the Ninepipe Reservoirs were submitted to the President. Both were established by Executive order on June 25, 1921. The orders state that the sites are within "the Flathead Irrigation Project, Montana," and that "with the surrounding lands now included within the Reclamation Service reservations, \* \* \* the same are hereby reserved, subject to Reclamation Service uses under the provisions of the act approved June 17, 1902 (32 Stat. 388), and to any other valid, existing rights \* \* \*."

It appears that the Flathead Indians have been attempting for several decades to obtain compensation for the taking of the reservoir sites. In 1922, a bill was introduced for the relief of the Flathead

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Indians, but the Department recommended against its enactment on the ground, among others, that the claim for compensation for the reservoir sites could be satisfactorily adjusted between the tribes and the Department (letter of Acting Secretary Finney to the House Committee on Indian Affairs, dated April 3, 1922). A jurisdictional act was passed in 1924 for the relief of certain tribes in Montana, including the Flathead (43 Stat. 21), but the Flathead Tribes took no action thereunder, presumably on the ground that the scope of the act was too narrow. After several attempts to secure more satisfactory legislation, a bill was passed by the Seventy-ninth Congress to enable these tribes to sue the United States, and it was approved by the President on July 30, 1946 (60 Stat. 715). The Department, in its report on recent jurisdictional bills, pointed out that the claims of the Flathead Tribes included one for the taking of lands for reservoir sites. (See S. Rept. No. 1325 and H. Repts. No. 2050 and No. 2485, all in the 79th Cong., 2d sess., 1946.)

While a jurisdictional act does not in itself have the effect of extinguishing Indian title, I think it is clear that there has been such a taking of the interest of the Flathead Tribes in the reservoir sites that the governing body of the tribes has been deprived of jurisdiction over them. The tribes undoubtedly still have an interest in the lands, since they have an interest in the proceeds of their disposition. By reason of this interest, the lands may be regarded as both public lands and Indian lands. *Ash Sheep Co. v. United States*, 252 U. S. 159 (1920). It may be also that the Government has not taken more than a flowage easement over the reservoir sites. This is, however, a question which need not be determined now, nor need it be considered whether the taking has given rise to a claim for compensation which may be asserted against the United States. Jurisdiction and title do not necessarily depend upon each other. The real question is whether the control which the Government has assumed over the sites is consistent with the exercise of regulatory jurisdiction by the tribes. It was pointed out in Solicitor's opinion dated February 12, 1943, 58 I. D. 331, which considered the question whether the Shoshone Indians could regulate hunting and fishing on ceded portions of the Wind River Reservation, that the answer to such a question could not be derived from the Janus-faced concept of Indian trust lands, and that it was necessary to look at the realities of the situation. It was concluded that the Shoshone Tribe could not exercise jurisdiction over ceded lands because the purpose of the cession was to dispose of the lands to white settlers, and that this purpose was inconsistent with any assumption of continued Indian jurisdiction.

The same reasoning applies to surplus lands. Such lands are opened to white settlement no less than ceded lands. The use of the surplus

lands for reservoir purposes constitutes no less a termination of Indian jurisdiction. It is of some significance in this connection that although Congress in section 3 of the act of June 18, 1934 (48 Stat. 984; 25 U. S. C. sec. 463), authorized the Secretary of the Interior to restore to tribal ownership "the remaining surplus lands of any Indian reservation," it excepted "lands within any reclamation project heretofore authorized in any Indian reservation."

It is true that this office held in a memorandum of July 30, 1942, that the Flathead Tribe had not lost jurisdiction over the Pablo and Ninepipe Reservoirs. This conclusion was in accord with the prevailing view at that time which predicated jurisdiction upon Indian trust title. It is in conflict, however, with the premises of the later Shoshone opinion.

I conclude, therefore, that the Council of the Flathead Tribe lacked authority to enact the resolutions of August 23 and October 24 insofar as they purport to establish shooting lanes within the Pablo and Ninepipe Reservoirs on the Flathead Reservation.

MASTIN G. WHITE,  
*Solicitor.*

#### SINCLAIR WYOMING OIL COMPANY

A-24393

*Decided January 6, 1947*

#### Renewal Oil and Gas Leases—Royalty Scale.

The royalty scale used in oil and gas leases issued in renewal of 5 percent or "a" leases provides for a straight step-scale royalty and not a combination-step and sliding-scale royalty.

#### APPEAL FROM THE GEOLOGICAL SURVEY

This is an appeal from the decision of the Acting Director of the Geological Survey, dated June 11, 1946, which affirmed the oil and gas supervisor's interpretation and application of 43 CFR 192.81<sup>1</sup> and the royalty section of renewal oil and gas lease, Cheyenne 029630 (a).

The lease was issued on February 3, 1945, effective as of October 1, 1942, in renewal of the original 20-year lease which was issued on October 10, 1922. The original lease was a discovery lease, a so-called "a" lease, granted under section 14 of the Mineral Leasing Act (41

<sup>1</sup> References to section numbers of regulations and designations of lease forms in this decision are to such numbers and designations as they existed prior to October 28, 1946. On that date the oil and gas regulations contained in Parts 191 and 192 of 43 CFR and the lease forms were completely revised (11 F. R. 12952).



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Stat. 442; 30 U. S. C. sec. 223), which bore a flat royalty rate of 5 percent on all production of oil. With respect to royalties, section 2 (e) of the renewal lease provides:

\* \* \* the lessee hereby agrees:

(e) *Royalties.*—To pay the lessor royalties, as follows, on the amount or value of all production from the leased lands \* \* \*.

(1) When the price of oil used in computing royalty value is \$1 or more per barrel, the per centum of royalty shall be as follows:

When the average production for the calendar month in barrels per well per day is—

not over	110,	the royalty shall be 12.5 percent;
over 110 but not over 130.	" " " "	18 "
" 130 " " " 150.	" " " "	19 "
* * * * *		
over 350 but not over 400,	the royalty shall be 24	percent.
* * * * *		

The renewal lease was issued under regulations adopted by the Department on August 5, 1940 (43 CFR, Cum. Supp., 192.75–192.85; Circ. 1476). Section 192.81 provided with respect to royalties:

On applications for the renewal of leases which carry a flat royalty of 5 percent to the United States, the renewal lease shall provide (a) as to oil, a minimum royalty of 12½ percent until the average production reaches 110 barrels of oil per well per day, and for production in excess of that amount the step-scale royalty rate prescribed in the form of lease contained in § 192.28, and (b) as to gas, the rate of royalty prescribed in such form of lease.

On applications for the renewal of 20-year leases which carry (a) as to oil, a sliding-scale royalty rate of 12½ to 33⅓ percent; \* \* \* the renewal lease shall provide as to oil, gas, casing-head gasoline, and other products, the rates of royalty prescribed in the form of lease above referred to. The method of computing all royalties shall conform to the provisions of the operating regulations.<sup>2</sup>

Oil is being produced from the lease from a well in the Tensleep sand at an average daily rate of about 400 barrels per well. Construing section 192.81 and section 2 (e) of the lease to mean that the entire production from this sand is to be charged at a single royalty

<sup>2</sup>The form of lease referred to in 43 CFR 192.28 contains a royalty section reading exactly the same as that quoted from the lease in question, except that the royalty scale in the lower brackets is as follows:

"Not over	50,	the royalty shall be 12.5 percent.
Over 50 but not over 60,	the royalty shall be 13 percent.	
" 60 " " "	70,	the royalty shall be 14 percent.
" 70 " " "	80,	the royalty shall be 15 percent.
" 80 " " "	90,	the royalty shall be 16 percent.
" 90 " " "	110,	the royalty shall be 17 percent.
" 110 " " "	130,	the royalty shall be 18 percent.
" 130 " " "	150,	the royalty shall be 19 percent."
* * * * *		

The language in the lease is practically identical with that in 43 CFR 192.55 which prescribes the rate of royalties.

rate, the oil and gas supervisor billed appellant for royalty at the rate of 24 percent, the rate applicable where the average daily production per well is between 350 and 400 barrels. Appellant appealed, contending that under section 192.81 the first 110 barrels were subject only to a royalty charge of 12½ percent and that only the excess over 110 barrels was subject to the higher rates of royalty.

In the decision under review the Acting Director of the Geological Survey affirmed the supervisor. He held that under the step-scale royalty provision used in competitive and noncompetitive leases and renewals of other than "a" leases, a single royalty rate is charged on the entire production; that since the royalty provision in appellant's lease is exactly the same, except for a difference in the rates at the bottom of the royalty scale, it should be construed to have the same application. He found that nothing in section 192.81 required a different conclusion, but that, even if it did, the regulation could not govern over the specific provisions of the lease.

Sinclair Wyoming assails the Acting Director's decision in numerous respects. However, its contentions appear to boil down to this: (1) section 192.81 of the regulations clearly provides for a flat 12½ percent rate on average daily production up to 110 barrels and for step-scale rates on production in excess thereof; (2) section 192.81 modifies the royalty provisions in the lease to that extent.

Upon a consideration of the specific provisions of appellant's lease and section 192.81, I believe that the decision of the Acting Director is correct.

To determine the royalty obligation of the appellant to the United States, it is necessary to look to the contract which creates this obligation, namely, the lease. As set forth, there is nothing in section 2 (e) of the lease to sustain the interpretation which appellant would put on it. According to the clear language of the section only a single rate is to be charged on production, the exact rate to be determined by the rate of production. Nothing is said about dividing the production and charging the portion below 110 barrels at a fixed 12½ percent rate while the portion above 110 barrels is to pay a graduated rate.

This view of section 2 (e) is clearly supported by a consideration of the lease forms referred to by the Acting Director. Prior to the act of August 21, 1935 (49 Stat. 674), two lease forms were in general use. Both bore the same number (4-208e), but different royalty provisions. The form used for "a" leases, those issued as a reward for discovery, provided for a flat 5 percent royalty on oil. The other form, used for "b" leases, carried a sliding-scale royalty provision which called for different rates to be applied to different portions of

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the production.<sup>3</sup> With the ending by the 1935 act of the prospecting permit and 20-year lease system and the adoption of the 5- and 10-year noncompetitive and competitive lease system, a new form of lease (4-208f) and a new type of royalty scale, a step-scale as distinguished from the old sliding scale, was adopted by the Department on May 7, 1936 (Circ. No. 1386, pars. 13 and 17, 55 I. D. 502; now 43 CFR 192.28 and 192.55). Over 4 years later when the regulations on renewal of 20-year leases were issued, lease forms for the renewal leases were adopted at the same time (form 4-973). These forms, one used in renewing "a" leases and one in renewing "b" leases, contained exactly the same royalty section as that used in the new type leases, except that the "a" renewal lease provided for a 12½ percent rate on average daily production up to 110 barrels, whereas the "b" renewal lease, like the new type lease, applied the 12½ percent rate only on production up to 50 barrels and provided for graduated rates from 13 percent to 17 percent on production from 50 to 110 barrels (see footnote 2).

There has never been any question as to the meaning of the royalty section in the new form leases adopted in 1936. It plainly calls for a single royalty rate to be applied on all production as contrasted with the old sliding-scale provision. The Department has always so construed it and had followed that construction for over 4 years prior to the adoption of the renewal lease forms. Absent any other considerations, the conclusion would be compelling that the renewal lease forms must be given the same interpretation, and they have been up to the present time.

Appellant, however, says that there is a consideration which vitiates this conclusion. It asserts that 43 CFR 192.81, *supra*, provides that only 12½ percent is to be charged on the first 110 barrels of average production, and that only the production in excess is to be charged at the higher rates. It declares that this interpretation is clearly required by the terms of the section:

\* \* \* the renewal lease shall provide (a) as to oil, a minimum royalty of 12½ percent until the average production reaches 110 barrels of oil per well

<sup>3</sup> The lease provision reads as follows:

"\* \* \* the lessee hereby agrees \* \* \* To pay the lessor \* \* \* royalty on all oil and gas produced from the land leased herein \* \* \* as follows:

"(1) For all oil produced of 30° Baume or over:

"On that portion of the average production per well not exceeding 20 barrels per day for the calendar month—12½ percent.

"On that portion of the average production per well of more than 20 barrels and not more than 50 barrels per day for the calendar month—16½ percent.

"On that portion of the average production per well of more than 50 barrels and not more than 100 barrels per day for the calendar month—20 percent."

[The scale continued with a charge of 25 percent on the portion of production from 100-200 barrels and 33½ percent on the portion of production in excess of 200 barrels. A lower scale was provided for oil of less than 30° Baume.]

per day, and for production in excess of that amount the step-scale royalty rate prescribed in the form of lease contained in § 192.28 \* \* \*.

The Acting Director interpreted this language as intended merely to modify the step scale of royalty which had been in use for over 4 years to eliminate the graduated steps of royalty rates of 13 to 17 percent on the graduated steps of production from 50 to 110 barrels per well per day and to extend the 12½ percent rate to production in those brackets.

It may be conceded that, standing alone, section 192.81 is susceptible of the construction urged by appellant. It appears equally susceptible, however, of the interpretation placed upon it by the Acting Director. But when it is considered that the "a" renewal form was approved simultaneously with section 192.81, thus evidencing the concurrent departmental construction of the section, there can be no doubt that the Acting Director's view is correct. This view harmonizes both the regulation and the lease form; appellant's interpretation results in a clash between the two. It is unreasonable to assume that the Department would have approved at one and the same time inconsistent provisions. Appellant argues that section 192.81 was intended to give some consideration to the holders of 5 percent leases; the view here taken is consonant with that idea. For example, the holder of an "a" renewal lease pays only 12½ percent on production of 105 barrels, whereas holders of other step-scale leases would pay 17 percent. Appellant's contention furthermore would result in the imposition of a hybrid sliding-scale and step-scale royalty schedule. While this does not in itself repel appellant's argument, it is highly unlikely that, in view of the Department's familiarity with the sliding-scale lease and its use for years of a lease which clearly sets forth such a scale (see footnote 3), the Department would have written into the renewal form an unmistakable step-scale provision when a combination provision was intended.

In the face of these considerations, it must be held that appellant's lease provides only for a step scale of royalty rates; that this provision in the lease comports fully with section 192.81; and that therefore the supervisor's interpretation of the lease was correct. In this view of the case, it is unnecessary to consider the other points raised on the appeal. Accordingly, the decision of the Acting Director is affirmed.

C. GIRARD DAVIDSON,  
*Assistant Secretary.*

## THE TWENTYMILE OIL AND GAS COMPANY

A-24435

*Decided January 10, 1947***Mineral Leasing Act—Placer Mining Claim—Oil and Gas Lease.**

Where a timely application for an oil and gas lease was filed under section 19 of the Mineral Leasing Act by a company which claimed to have a valid oil and gas placer location, and, as provided by the regulations then current, the application was accompanied by the tender of a deed quitclaiming the placer location to the United States, such tender constituted only conditional delivery of the deed, and rejection of the application included a rejection as well of the deed.

**APPEAL FROM THE GENERAL LAND OFFICE<sup>1</sup>**

In 1920, shortly after the enactment of the Mineral Leasing Act, The Twentymile Oil and Gas Company, a Colorado corporation, filed an application for a prospecting permit and thereafter an amendment to the application requesting the issuance of a lease under section 19 of the act (41 Stat. 445; 30 U. S. C. sec. 228). As amended, the application represented that all except one of the owners of the Boyles oil placer mining claim had quitclaimed their interest in the claim to the corporation and that the remaining owner was expected to convey his interest within a short time. Further representations were made concerning the history of the claim and of the Company and then, in purported accordance with certain regulations of the Department (47 L. D. 437, 453, 454 (1920)), the applicant tendered "a relinquishment to the United States of all its right, title, and interest in and to the land in question." It accompanied the application with a quitclaim deed which recited that the corporation conveyed its claim to the United States; no consideration for the conveyance was set forth in the deed.

The Commissioner of the General Land Office noted certain defects in the amended application<sup>2</sup> and the corporation was informed that a supplemental showing would be necessary and that, upon failure to make the showing within a specified time or to file an appeal, the application would be finally rejected without further notice. After an extension of time to June 9, 1925, was requested and allowed, nothing further was heard from the corporation and upon receipt of information from a division inspector that the corporation was no

<sup>1</sup> Effective July 16, 1946, the General Land Office and the Grazing Service were abolished and their functions were transferred to the Bureau of Land Management, by Reorganization Plan No. 3 of 1946 (11 F. R. 7875, 7876; 7776).

<sup>2</sup> The following defects were described: No date was given on which the rig and drilling equipment were placed on the land; the date of a claimed discovery was omitted; there was no itemized statement of the cost of the work performed and improvements made on or for the benefit of the location; no diagram was supplied showing the location of all wells and improvements; no evidence was submitted as to the publication of notice that the lease was being sought.

longer interested in the matter, the application was finally rejected and closed on May 3, 1926.

Recently the land was offered for oil and gas leasing at competitive bidding. A few days after the bids were opened, the remaining directors of the corporation, as trustees therefor, filed a protest against the issuance of an oil and gas lease of this land to another entity. The protest, like the rejected lease application, described a gas well drilled by the corporation on the land, the production of 500,000 c. f. of gas, and the cost of making such a discovery. Protestant then urged that no consideration had been given to the corporation by the United States for the relinquishment of the placer mining claim and contended that the corporation still possesses both the right to obtain a patent for the land and the preference rights of locators to a lease of the land.

The Commissioner of the General Land Office dismissed the protest. He observed that the consideration for the relinquishment was the right to receive an oil and gas lease under section 19 of the Mineral Leasing Act. The failure to complete the application, he stated, did not void a relinquishment which had been accepted by the United States in good faith with intent to issue the lease upon completion of an acceptable application.

The corporation has appealed. It maintains that the consideration for the relinquishment was to be a lease, not merely the right to apply for a lease. The corporation further contends that if the Commissioner is correct, then its right to receive a lease must still exist; or, in the alternative, that if the right to obtain a lease has terminated, then the deed should be returned. In either event, it maintains that the protest should be allowed.

A copy of the appeal has been served upon the high bidders at the recent lease offering and a brief has been received from one of them.

Section 19 of the Mineral Leasing Act provides, among other matters, that any person who, on October 1, 1919, was a bona fide claimant of oil and gas lands and who had previously performed all acts under then existing laws "necessary to valid locations," and who, in addition, had made discovery prior to February 25, 1920, would be entitled to a lease of such lands by filing an application therefor within 6 months after February 25, 1920. The holder of such a claim was under no duty to file his application; he was at liberty to prove his claim under the mining laws (41 Stat. 451, as amended; 30 U. S. C. sec. 193).

The regulations of the Department which were in effect when the lease application was filed and pending provided that an applicant for a lease under section 19 must—

\* \* \* file a relinquishment to the United States of all right, title, and interest in and to the land, together with an application for a \* \* \* [lease]. This relinquishment may be in the form of an unconditional quit-claim deed,

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duly executed and acknowledged, but not recorded, *and when filed will be held for such action as the facts and the law in the case warrant and require.* [Italics supplied; 47 L. D. 437, 453; 454 (1920).]

The emphasized portion of the quoted provision of the regulation contains the unmistakable inference that the mere filing of the deed with the application was not intended to effectuate a transfer of the title to the claim. The deed was to be retained for further action. Nor can it be said, as apparently intimated by the Commissioner, that Assistant Secretary Finney, in a letter dated August 7, 1924, made such promise to receive an amendment to the original application, despite expiration of the time limit specified in section 19, as might be the consideration for the deed. Rather, Assistant Secretary Finney's letter specifically provided that the application was to be filed under certain regulations, among which was the regulation quoted above.

The second alternative is that the establishment of the right to receive a lease could effectuate the transfer. But the protestant never had a right to receive a lease because it never filed an acceptable application therefor. On the contrary, its application was deemed insufficient and was finally rejected.

The third alternative is that the issuance of a lease itself was intended to be both the consideration for and the condition of the delivery of the deed. This is the view which was apparently held at the time. Thus, in a proceeding under a portion of section 18 of the Mineral Leasing Act, which is similar in purport to section 19 and which was administered under similar regulations, the Department noted the filing of applications and "quitclaim deeds in consideration of a lease or leases as provided for in the said leasing act of February 25, 1920." *Honolulu Consolidated Oil Company*, 48 L. D. 303, 311 (1921). The undoubted contemplation of the parties at the time of the transaction was that the deed would not be operative until a lease was issued in consideration therefor.

More, in this particular instance the deed was attached to an application which noted that, "The applicant herewith tenders a relinquishment to the United States of all its right, title and interest in and to the land in question." The entire application was finally and formally rejected. The tender, being a part of the application, was necessarily included in the rejection.

This does not mean, however, that the protest is to be allowed. One of the high bidders suggests that the Department is now justified in assuming that there has been no discovery on the claim and that the claim has been abandoned. But such matters are to be determined on the basis of a hearing at which all parties have a reasonable oppor-

tunity to be heard. *Cf. United States v. State of Arizona*, A. 24175, April 25, 1946 (unreported).<sup>3</sup>

Accordingly, further investigation will be made of such matters as to whether the claim was validly initiated and maintained as against the United States and the present extent of the protestant's interest, if any. If such investigation indicates that the placer mining claim is properly subject to contest by the United States, a hearing will be held after appropriate notice to all parties having an interest in the matter.

The decision of the Commissioner is modified accordingly, and the case is remanded to the Bureau of Land Management for further proceedings in accordance with this decision.

WARNER W. GARDNER,  
*Assistant Secretary.*

#### DELEGATION OF AUTHORITY TO THE COMMISSIONER OF INDIAN AFFAIRS TO WAIVE ORDER NO. 420, AS MODIFIED

##### Delegation of Authority—Commissioner of Indian Affairs—Sale of Trust or Restricted Indian Lands.

The Secretary cannot properly delegate to the Commissioner of Indian Affairs the authority to waive the limitation imposed by Order No. 420, as modified by Order No. 498 (25 CFR 241.12a), upon the sale of trust or restricted Indian lands and to approve the sale of such lands in individual cases which do not fall within any of the categories specified in the modified order as being appropriate for such approval.

The Indian Delegation Act (act of August 8, 1946, 60 Stat. 939; 25 U. S. C. A., Supp., sec. 1a) contemplates that the Secretary of the Interior will issue in regulation form various rules and standards which are to govern the administration of Indian affairs; and he cannot properly delegate to the Commissioner of Indian Affairs authority to issue regulations or authority to depart from or ignore the regulations issued by the Secretary of the Interior.

M-34829

JANUARY 10, 1947.

TO ASSISTANT SECRETARY GARDNER.

You have informally requested that this office consider the question whether the Secretary of the Interior may properly delegate to the Commissioner of Indian Affairs the authority to waive, in his discretion, the limitation imposed by Order No. 420, as modified by Order No. 498, upon the sale of trust or restricted Indian lands and to ap-

<sup>3</sup> It is also suggested that the appellant has not performed assessment work; but such failure, if any, would not offer any bases for enhancement of the rights of the United States in the land involved. *Ickes v. Virginia-Colorado Development Corp.*, 295 U. S. 639 (1935).



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prove the sale of such lands in individual cases which do not fall within any of the categories specified in the modified order as being appropriate for such approval.

Order No. 420, as originally issued, was in the form of a letter dated August 12, 1933, from the Commissioner of Indian Affairs to all Indian superintendents. The letter was approved by the Secretary of the Interior. It instructed the superintendents that "no more trust or restricted Indian lands, allotted or inherited, shall be offered for sale \* \* \* except in individual cases of great distress or other emergency where it appears absolutely necessary that a restricted Indian tract of land be offered for sale for relief purposes." This order was subsequently modified by Order No. 498 (March 3, 1939; 4 F. R. 1260) so as "to permit the sale of taxable lands (a) which would otherwise be lost for nonpayment of taxes; and (b) whose sale, if allowed, would yield cash or commodities for the improvement of the Indian vendor's economic position." The order, as thus modified, was incorporated in the Code of Federal Regulations, Cum. Supp., as section 241.12a of Part 241, Title 25.

Prior to September 9, 1946, the Secretary of the Interior considered each proposal for the sale of trust or restricted Indian lands and determined whether the particular sale should or should not be approved under the provisions of 25 CFR 241.12a. However, on the date mentioned the Secretary, acting pursuant to the act of August 8, 1946 (60 Stat. 939), delegated to the Commissioner of Indian Affairs authority to approve "sales and conveyances of original allotments and inherited lands pursuant to the provisions of 25 CFR, Part 241." (Par. (d), section 4.713, Order No. 2252; 11 F. R. 10296, 10297.) The Commissioner, when called upon to approve the sale of trust or restricted Indian land, must determine whether the sale is or is not authorized by the provisions of 25 CFR 241.12a, and, if the sale is not authorized by that section, he must withhold his approval.

The Secretary is permitted by the act of August 8, 1946, to delegate his statutory powers and duties under the laws governing Indian affairs to the Commissioner of Indian Affairs "insofar as such powers and duties relate to action in individual cases arising under general regulations promulgated by the Secretary of the Interior pursuant to law." The statute contemplates that the Secretary of the Interior will issue in regulation form and in accordance with law the various rules and standards which are to govern the administration of Indian affairs, and permits the Secretary to delegate to the Commissioner of Indian Affairs the task of applying such rules and standards to individual cases and particular situations as they arise. It seems clear that the Secretary cannot properly delegate to the Commissioner

authority to issue regulations or authority to depart from or ignore the regulations issued by the Secretary of the Interior.

Accordingly, I conclude that the question stated in the first paragraph of this memorandum must be answered in the negative.

I express no opinion as to whether the regulation (25 CFR 241.12a) which governs the sale of trust or restricted Indian lands should or should not be changed by the Secretary of the Interior in such a way as to liberalize its provisions. However, it is noted that the reason for the issuance of the regulation in its original form (Order No. 420) was stated to be the "existing economic conditions and the very poor market for Indian-owned restricted lands." As economic conditions have greatly changed since August 12, 1933, it might be well to reexamine the departmental policy relative to this matter in the light of present conditions.

MASTIN G. WHITE,  
*Solicitor.*

#### **AUTHORITY OF THE SECRETARY TO ADMINISTER TIDELANDS ADJOINING KATMAI NATIONAL MONUMENT IN ALASKA**

**Administration of Territorial Tidelands Adjoining National Monument—  
Authority of the Secretary—Bureau of Land Management—National  
Park Service.**

Territorial tidelands may be administered by the Secretary, without disposition or depletion, under the general grant of jurisdiction over public lands contained in section 453, Revised Statutes (43 U. S. C. sec. 2), in that the Secretary or the appropriate official of the Bureau of Land Management may issue a revocable permit for a clam-canning operation on tidelands adjoining the Katmai National Monument.

In addition, littoral owners in Alaska have a right of access to navigable water, which right is appurtenant to the upland but may be separated from it. Hence, the Secretary or the appropriate official of the National Park Service may, pursuant to the act of August 25, 1916 (39 Stat. 535; 16 U. S. C. sec. 3), grant a revocable permit for a portion of the Katmai National Monument lands, together with the right of access to navigable water over intermediate tidelands, or may simply grant the said right of access.

M-35081

JANUARY 10, 1947.

TO ASSISTANT SECRETARY GARDNER.

The Cape Douglas Canning Corporation of Seattle applied, under date of December 5, 1946, to the National Park Service for a permit to can clams at Swikshak, Alaska, in the Katmai National Monument. It proposed to erect a temporary building at the end of a sand spit located at the entrance to Swikshak Bay "on set piling below the mean high water line." Because the boundary of the monument extends

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only to "mean high tide" (Proclamation No. 1950 of April 24, 1931, 47 Stat. 2453), the Park Service, by its memorandum of December 16, referred the request to the Bureau of Land Management.

You have informally requested the opinion of this office as to whether the issuance of a revocable permit to use these tidelands for a temporary building to house a clam-canning operation is authorized.

1. The Supreme Court has held that the United States holds title to the tidelands of the territories in trust for the people of the future States. *Shively v. Bowlby*, 152 U. S. 1, 57 (1894); *Mann v. Tacoma Land Co.*, 153 U. S. 273 (1894); *Boraw, Ltd. v. Los Angeles*, 296 U. S. 10, 15 (1935). Congress has so legislated specifically with reference to Alaska. (Sec. 2, act of May 14, 1898, 30 Stat. 409; 48 U. S. C. sec. 411.) The Court has ruled that Congress must legislate with specific reference to tidelands in order to authorize their disposition. *Newhall v. Sanger*, 92 U. S. 761, 763 (1875); *Bardon v. Northern Pacific R. R. Co.*, 145 U. S. 535, 538 (1892); *Barker v. Harvey*, 181 U. S. 481, 490 (1901); *Union Pacific R. R. Co. v. Harris*, 215 U. S. 386, 388 (1910). In the *Mann* case, *supra*, the Court said that the general legislation of Congress with respect to public lands does not "extend to" tidelands, and in the *Boraw, Ltd.* case, *supra* (at p. 17), it was stated that "Specifically, the term 'public lands' did not include tidelands."

The Department, in accordance with the rulings of the Supreme Court, has consistently taken the position that tidelands cannot be disposed of under the public-land laws.<sup>1</sup>

However, in an opinion in 56 I. D. 110, 114, the Solicitor held, in construing section 2 of the Wheeler-Howard Act, that water areas and tidelands are covered by the phrase "public lands," on the ground, among others, that these areas are part of the "public domain," which "is synonymous with" public lands. See, also, *Alaska Pacific Fisheries et al. v. United States*, 240 Fed. 274 (1917).

Thus, while the decisions hold that Congress must legislate with specific reference to tidelands in order to authorize their disposition, no decision has been found holding that territorial tidelands are not public lands subject to administration—without disposition or depletion—under the general grant of jurisdiction over public lands contained in section 453, Revised Statutes (43 U. S. C. sec. 2). The legislative pronouncement that executive duties "in anywise respecting" the public lands are vested in this Department seems to authorize the beneficial administration of these tidelands.

<sup>1</sup> Red Star Olga Fishing Station, 26 L. D. 533 (1898), refusal to confirm patent based on survey of tidelands; James W. Logan, 29 L. D. 395 (1900), refusal to recognize placer location made on Alaskan tidelands; Jesse C. Martin, 32 L. D. 1 (1903), denial of application for right-of-way to build pier in tidelands of Alaska and for privilege of purchase.

It has long been recognized that the executive departments of the Government have the implied authority to grant revocable permits for the use of lands under their jurisdiction if the permission is in the public interest, directly or indirectly (22 Op. Atty. Gen. 240, 245). It appears that the proposed clam-canning operation would provide employment for local residents in this remote area and would aid the development of Alaska, and apparently it would not mar the scenic characteristics of the monument. Therefore, it is my view that the Secretary or the appropriate official of the Bureau of Land Management<sup>2</sup> could properly conclude that the issuance of a revocable permit for the purpose indicated would be in the public interest.

2. In addition to the Secretary's authority outlined in point 1, reliance may be placed on his authority with reference to the national parks and monuments. Section 3 of the act of August 25, 1916 (39 Stat. 535; 16 U. S. C. sec. 3), authorizes the Secretary to make such rules and regulations as he may deem necessary or proper for the use and management of the parks and monuments under the jurisdiction of the National Park Service. As stated in the proclamation creating it, the Katmai Monument is under the jurisdiction of the Park Service, which has, in the past, issued its "special use permits" for clam-canning operations within the monument boundaries. (36 CFR 2.31 (b).)

Littoral owners in Alaska have a right of access to navigable water and, incident to making this access practical, may erect private wharves on the tidelands so long as they do not interfere with public navigation. *Alaska Juneau Gold Mining Co. v. Northern Lumber Mills*, 5 Alaska 269, 271 (1915); *Wrangell Ice Co. v. McCormack Dock Co.*, 7 Alaska 296, 311 (1925). It further appears that this littoral right of access to navigable water, while appurtenant to the upland above mean high tide, may be separated from it by the littoral proprietor. *Decker v. Pacific Coast S. S. Co.*, 164 Fed. 974 (1908); *Wrangell Ice Co. v. McCormack Dock Co.*, *supra*. No reason is known why the Federal Government should be denied rights possessed by private littoral owners in Alaska.

Therefore, it seems that the Secretary or the appropriate official of the National Park Service may grant a revocable permit for this clam-canning operation upon suitable portions of the monument lands, together with the right of access to navigable water over intermediate

<sup>2</sup> The Bureau regulates "the beneficial use \* \* \* [of public lands] for special purposes not specifically provided for by the existing public land laws." (43 CFR 258.1 *et seq.*) A temporary, nondepleting use of the tidelands surrounding the Territory of Alaska pending statehood or other specific congressional action, by adaptation of the Bureau's special-use permit, appears feasible.

*January 16, 1947*

tidelands, or may simply grant the littoral right of access to navigable water which is incident to ownership of the monument lands.

3. For the reasons indicated above, it is my opinion that the question stated in the second paragraph of this memorandum should be answered in the affirmative.

I suggest that the permit, if issued, be signed by the Secretary or Under Secretary or an Assistant Secretary in order that its validity may rest upon both of the theories discussed in this memorandum.

MASTIN G. WHITE,  
*Solicitor.*

**SALES OF GROCERIES AND SUPPLIES BY THE ALASKA ROAD  
COMMISSION FROM WAREHOUSE STOCKS TO ITS EMPLOYEES  
FOR PERSONAL USE**

**Federal Employees—Sales of Warehouse Stocks of Groceries and Supplies—  
Alaska Road Commission.**

In the absence of specific statutory authority, a proposed arrangement whereby the Alaska Road Commission would sell groceries and supplies from its warehouse stocks to its employees for their personal use is forbidden.

M-35080

JANUARY 16, 1947.

TO ASSISTANT SECRETARY GARDNER.

You have asked me whether the Alaska Road Commission may properly be authorized to sell groceries and supplies from its warehouse stocks to its employees for personal use.

It appears that the Alaska Road Commission has warehouse stocks of groceries and supplies in Anchorage, Valdez, and Fairbanks for the purpose of furnishing subsistence to employees while they are on field duty. The retail prices of these items in interior Alaska have advanced considerably during the past several months because of shipping difficulties, which have caused a depletion of retail stocks. The high prices are creating general dissatisfaction among the Commission's employees, and they have petitioned the Commission for the privilege of purchasing groceries and supplies from the warehouse stocks for personal use.

In the absence of specific statutory authority covering the point, it is necessary to conclude that the use of appropriated funds for the purchase and sale of supplies to employees is forbidden by section 3678 of the Revised Statutes (31 U. S. C. sec. 628), which provides that appropriations must be applied solely to the objects for which made and no others (4 Comp. Dec. 441), and that such sale would also contravene the general rule that property of the United States cannot be

disposed of without an authorization from the Congress. *Royal Indemnity Co. v. United States*, 313 U. S. 289 (1941); 39 Op. Atty. Gen. 324. Furthermore, it may be noted in this connection that if the supplies were sold for the purpose mentioned, the proceeds from the sale would not be available to the Commission for the replacement of the depleted stocks. Instead, it would be necessary to cover such proceeds into the Treasury (Rev. Stat. sec. 3618; 31 U. S. C. sec. 487).

The request from the Chief Engineer of the Commission to the Division of Territories and Island Possessions for authority to carry out the arrangement points to sales of supplies by The Alaska Railroad, the Civil Aeronautics Authority, the Forest Service, and the Army as precedents for the arrangement. However, in each of the cited instances the arrangement is supported by specific authority. The Alaska Railroad may purchase stores for resale under the authority of the Interior Department Appropriation Act, 1947. The Civil Aeronautics Administration is authorized by the First Supplemental National Defense Appropriation Act, 1943, to purchase and resell food and supplies to employees. The Secretary of Agriculture is authorized to purchase equipment and supplies for employees of the Forest Service and to make deductions therefor from their salaries (16 U. S. C. sec. 557). The Army is authorized by statute to sell Quartermaster property and subsistence supplies to officers and enlisted men (10 U. S. C. secs. 1231, 1232, 1237, 1238). The Army is also authorized to sell subsistence supplies to bureaus of the War Department and to other executive departments and employees thereof (10 U. S. C. sec. 1253). Apparently, the Army draws authority from these statutes to sell subsistence supplies to civilians employed with the Army at stations where the use of sales facilities operated by civilian agencies is impracticable (AR 30-2290, dated April 18, 1946).

As written, the Army regulations do not extend to employees of the Alaska Road Commission the privilege of purchasing Quartermaster subsistence supplies. However, the regulations provide for further authorizations being granted by the Quartermaster General in specific cases. The Director of the Division of Territories and Island Possessions may desire to explore the possibility of obtaining such an authorization. Compare opinion of the Judge Advocate General, June 4, 1914, Dig. Op. J.A.G. 1912-1940, p. 881. See opinions of the Judge Advocate General, July 10, 1919, November 1, 1918, Dig. Op. J.A.G. 1912-1940, p. 802, wherein sales of commissary supplies to customs officers and employees and civil-service employees of a military post office were approved.

MASTIN G. WHITE,  
*Solicitor.*

## BURNHAM CHEMICAL COMPANY

A-24407

*Decided January 22, 1947***Sodium-Lease Application—Reinstatement.**

A petition for reinstatement of a sodium-lease application will not be granted where the applicant is not entitled as a matter of law or equity to the issuance of a lease without competitive bidding and reinstatement of the application would therefore serve no useful purpose.

**APPEAL FROM THE GENERAL LAND OFFICE<sup>1</sup>**

This is an appeal by the Burnham Chemical Company from a decision of the Commissioner of the General Land Office, dated June 18, 1946, denying its petitions for the reinstatement of its applications for a sodium permit and lease on a 10-acre tract of land known as the Little Placer claim (SW $\frac{1}{4}$ SW $\frac{1}{4}$ NE $\frac{1}{4}$  sec. 24, T. 11 N., R. 8 W., S. B. M., California).

This proceeding is another step in the long series of actions which have involved the Little Placer claim during the last two decades. Briefly, the history of the case, so far as pertinent, is as follows: On June 1, 1928, appellant filed its application for a sodium prospecting permit covering, among other lands, the Little Placer claim (L. A. 045676). The Commissioner rejected the application as to the Little Placer on November 23, 1928, upon the basis of a report from the Geological Survey that section 24 contained sodium salts in commercial quantities and was, therefore, subject only to lease. In his decision, on the ground that Burnham's permit application conflicted with a prior mining location made on the Little Placer by the United States Borax Company, and conflicted as to other land with prior mining locations made by the Western Borax Company, the Commissioner also ordered a hearing to be held between the claimants to determine whether the mining locations were valid. The question involved was whether the lands were known at the time of mining location to contain sodium borates of the type described in section 23 of the Mineral Leasing Act (41 Stat. 437, 447),<sup>2</sup> so that the lands were not subject to location under the mining law but only to leasing under the act.

Burnham did not appeal from the denial of its permit application. Instead, it filed, on January 16, 1929, an application for a sodium lease on the Little Placer (L. A. 046681). Accordingly, the Commissioner finally rejected the permit application on February 9, 1929.

<sup>1</sup> Effective July 16, 1946, the General Land Office and the Grazing Service were abolished and their functions were transferred to the Bureau of Land Management, by Reorganization Plan No. 3 of 1946 (11 F. R. 7875, 7876; 7776).

<sup>2</sup> " \* \* \* chlorides, sulphates, carbonates, borates, silicates, or nitrates of sodium dissolved in and soluble in water, and accumulated by concentration \* \* \*."

An extensive hearing was then held as directed by the Commissioner, culminating in a decision by him that the sodium borates known to exist in the Little Placer claim were not of the type embraced by the Mineral Leasing Act and that therefore the mining locations were valid. He accordingly held Burnham's lease application for rejection. The Department affirmed the Commissioner on March 8, 1933 (*Burnham Chemical Co. v. U. S. Borax Co. et al.*, 54 I. D. 183). The Commissioner thereupon finally rejected the application for a lease on May 3, 1933, and closed the case.

Four years later, before patent had issued to the U. S. Borax Company for the Little Placer, the Department reopened the case and brought adverse proceedings against the Company's mineral entry. After a second exhaustive hearing, the Department reversed its former decision, held that the Little Placer was known at the time the mining location was made to contain sodium borates of the type covered by the Mineral Leasing Act, and directed cancellation of the mineral entry. *United States v. U. S. Borax Co.*, 58 I. D. 426, decided April 28, 1943; motion for rehearing denied July 31, 1944, 58 I. D. 426, 440. The U. S. Borax Company thereupon brought suit against the Secretary to enjoin the cancellation of its mineral entry and to compel the issuance of a patent. *U. S. Borax Co. v. Ickes*, Civil Action No. 25789, U. S. District Court for the District of Columbia. Before the case was argued, however, it was dismissed with prejudice on August 31, 1945, in compliance with the consent decree entered in the anti-trust suit brought by the United States against the borax combine. *United States v. Borax Consol., Ltd., et al.*, 62 F. Supp. 220 (D. C. N. D., Calif., 1945). Pursuant to the decree, the U. S. Borax Company quitclaimed to the United States all of its claims to the Little Placer. Thereupon, the mineral entry was finally canceled and the case closed on December 19, 1945.

It will be noted that in the proceedings instituted by the Department in 1937 to cancel the mineral entry of the U. S. Borax Company and in the ensuing litigation, appellant was not a party and did not participate. However, a few months after the adverse proceedings had been ordered but before the hearing had been held, Burnham filed, on October 18, 1937, petitions to reinstate its permit and lease applications. Two years later, on May 11, 1939, while the case of the Borax Company's mineral entry was pending before the Commissioner, Burnham filed a petition asking that consideration be given to its applications for reinstatement. And, upon the dismissal of the Little Placer suit, it filed a further showing in support of its petition.

In these various papers, Burnham contended that the Department's decisions of 1943 and 1944 definitely established that the earlier deci-



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sion of March 8, 1933, was erroneous and that its lease application should have been allowed. It urged also that under departmental regulations existing on March 8, 1933, and at the time it filed its lease application, it was entitled to a lease without competitive bidding. In support of its petitions, it filed an affidavit that it had spent \$18,095 since 1927 in development work and litigation in connection with the Kramer borax fields, in which the Little Placer is situated.

By his decision of June 18, 1946, the Commissioner denied the petitions as to both permit and lease applications. His rejection as to the permit application was based on the ground that since the Little Placer was known to contain sodium borates, it was subject only to leasing. His rejection as to the lease application was placed on the ground that Burnham was not entitled to a preference right to a lease; that the competitive offering of the Little Placer for lease was under consideration; and that reinstatement of the application would serve no purpose. He stated that the expenditures made conferred no preference right to a lease and that the regulations in force on March 8, 1933, reserved the right to offer sodium leases at competitive bidding, in which case a prior application would give the applicant no priority or preference in securing a lease. He further declared that because the application of the U. S. Borax Company for a mining patent and another application were pending at the time Burnham filed its lease application, the land was not subject to other disposal so that Burnham was not entitled to an award or consideration at the time.

In its appeal, Burnham claims only a right to a lease, so the petition for the reinstatement of its permit application may be deemed abandoned. As to the lease, Burnham asserts that it is asking the Department to do only what it would have done in 1933 had it not rendered an erroneous decision, namely, issue a lease to Burnham without competitive bidding. Appellant contends that this was the intention of the Department in the event Burnham was successful at the hearing; otherwise Burnham would not have been given the burden of proof at the hearing. Appellant admits that the regulations in effect at the time its application was rejected expressly reserved the right to offer leases at competitive bidding despite the filing of prior applications. The regulations provided:

In the award of lease of any lands or deposits hereunder the right is reserved to order a sale of the lease at public auction to the bidder offering the highest cash bonus for lease thereof on such terms as may be prescribed for lease of the lands, *in which case any application for lease theretofore filed will give the applicant no priority or preference in securing a lease of the lands.* [Circ. No. 1194, pt. II, par. 5, approved June 14, 1929, 52 L. D. 651, 656; italics supplied.]

Appellant claims, however, that the Department's practice was not to exercise this right. It cites in support the Department's statement in amending Circular No. 1194, that—

Under the existing regulations (Circular 1194, 52 L. D. 651), governing the disposition of sodium deposits under the Leasing Act of February 25, 1920 (41 Stat. 437), and acts amendatory thereof, the practice is to award sodium leases to applicants therefor without competitive bidding. This system of disposing of sodium deposits has proved unsatisfactory. [Circ. No. 1364, approved August 9, 1935, 55 I. D. 319.]

Therefore, appellant urges, since it would undoubtedly have been given a lease in 1933 had the Department's decision been correctly rendered, and since it has been subjected to large expense and effort to substantiate its contention that the Little Placer was subject to lease, simple justice requires that it be offered a lease now.

Appellant also asserts that it should be granted a lease as a matter of equity because a foreign borax combine was working against it from 1928 on. It suggests that the combine could have colored the picture as to the Little Placer during the first hearing and that if appellant had been able to cope with the combine, it doubtlessly could have established its right to a lease in 1933.

Neither Burnham's appeal nor its petition for reinstatement purports to assert that it is entitled to a reinstatement of its lease application as a matter of law. Nor, assuming that its application was reinstated, does appellant contend that it has a legal right to the issuance of a lease. Such a contention could not be maintained. Section 24 of the Mineral Leasing Act, as amended (45 Stat. 1019; 30 U. S. C. sec. 262) provides that—

\* \* \* Lands known to contain valuable deposits of \* \* \* [sodium] and not covered by permits or leases shall be subject to lease by the Secretary of the Interior through advertisement, competitive bidding, or such other methods as he may by general regulations adopt and in such areas as he shall fix, not exceeding two thousand five hundred and sixty acres. \* \* \*

This language clearly imposes no mandatory duty upon the Secretary to issue a lease upon application but expressly authorizes him to issue leases by competitive bidding or by such other methods as he should decide. The departmental regulations under the section have never provided that the filing of an application vests the applicant with any right to a lease. Thus, in the first sodium regulations adopted by the Department on May 28, 1920, and in force when appellant filed its application, provision was made for publishing 30 days' notice when an application was filed and for awarding priority in the case of conflicting applications filed during the 30-day period upon the basis of investments proposed by the respective applicants, date of proposed productive development, and any equities resulting from

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improvement or development under claims made under other laws (Circ. No. 699, 47 L. D. 529, 533). And, as already pointed out, at the time appellant's application was finally adjudicated, the regulations additionally reserved the right to issue leases by competitive bidding despite the prior filing of applications. These regulations therefore made it plain that the mere filing of an application would not confer upon the applicant a right to a lease or even a preference right over later applicants for a lease.

Appellant's claim therefore comes down to the contention that it should be granted reinstatement and a lease because of equitable considerations. On this score, appellant avers that it would have been granted a lease without competitive bidding in 1933 had the Department not rendered an erroneous decision. This is pure conjecture. There is nothing in the record to indicate that a lease would have been issued to Burnham without competitive bidding in 1933 had it been successful in the hearing. It was given the burden of proof in the hearing because it was up to appellant, as a subsequent claimant, to prove that the prior mining locations on the property for which it had filed were invalid. Before the hearing was held on June 25, 1929, the express reservation of the right of competitive bidding was added to the regulations, so appellant was on notice that success in the hearing did not mean the issuance of a lease without competitive bidding. The fact that the Department may not normally have used the competitive bidding procedure was no assurance that it would not have used it in this case.

As for the expenditure of \$18,095 claimed to have been made, the affidavit submitted charges only \$1,963 to expenses incurred in the first hearing. The remaining amount is credited to development, legal, and other expenses chargeable generally to the Kramer borax field. While these latter expenditures may have had in part an incidental relationship to appellant's endeavor to secure a lease on the Little Placer, they are not so directly associated as to vest it with any substantial equities. As for the reference to the borax combine and the suggestion that it prevented appellant from successfully establishing its case in 1933, this is also so speculative and conjectural that it cannot be given appreciable weight.

It is not intended to suggest here that appellant did not incur expenses and expend considerable effort in its endeavor to obtain a lease on the Little Placer claim. Nor is it intended to say that the testimony contributed by appellant in the 1929 hearings was of no value in the subsequent proceedings which led to a reversal of the Department's original position. All that is held here is that such contributions were not of such weight as to entitle appellant as a

matter of equity to the issuance of a lease at this time without competitive bidding.

Since August 9, 1935, because the Department deemed the awarding of leases without competitive bidding to be unsatisfactory (Circ. No. 1364, *supra*), the Department has by regulation required competitive bidding in the issuance of leases (43 CFR 195.16). Studies of the Little Placer property since appellant's application was filed indicate that it contains a very substantial and valuable deposit of pure sodium borate (kernite). This deposit is estimated to be one of the largest known to exist. In view of its great value and the considerable amount of interest which has been manifested in it, it would not appear to be in the public interest to deviate from the established practice of the Department and to issue a noncompetitive lease at this time upon the basis of an application which was filed 18 years ago. Of course, in offering the Little Placer for lease, full opportunity will be given to appellant to submit a bid.

There need be no apprehension that any lease to the Little Placer will be issued to any interests which are inimical to the national welfare. With the disclosures of the antitrust suits brought against the borax combine in mind, the Department will issue any lease to the Little Placer only after a most careful scrutiny of the proposed lessee.

Because appellant has failed to establish any legal right to the reinstatement of its lease application, and because the equities in its favor would not justify a deviation from the Department's regulations requiring the issuance of sodium leases by competitive bidding, even if its application were reinstated, the decision of the Commissioner is affirmed.

OSCAR L. CHAPMAN,  
*Under Secretary.*

ANNIE L. HILL v. N. S. WILLIAMS AND T. C. LIDDELL  
MRS. JIMMIE SAUNDERS v. N. S. WILLIAMS AND T. C. LIDDELL  
J. N. HAWKINS, PROTESTANT

A-24248

*Decided January 23, 1947*

A-24255

#### Oil and Gas Leases—Interior Department Employees.

No officer or employee of the Department of the Interior may be admitted to any share or part in, or derive any benefit from, an oil and gas lease of public lands issued by the Department. As a matter of public policy, the Department will generally not dispose of any interests in any public lands to its employees. Any such lease obtained by an employee of the Department is subject to cancellation.

*January 23, 1947***Oil and Gas Leases—Cancellation—Concealment and Misrepresentation.**

Where an employee of the Department obtained an oil and gas lease and, upon order to show cause why it should not therefore be canceled, he and his assignees procured the Department's approval to his assignment of the lease by concealing and misrepresenting material facts with respect to his interests in the lease, the approval is subject to revocation, and the lease is subject to cancellation. Under such circumstances, it is unnecessary to consider whether the approval of the assignment was warranted in the first place. The cancellation will be effected in accordance with section 31 of the Mineral Leasing Act, as amended (act of August 8, 1946, sec. 9, 60 Stat. 950, 956).

**Protest Against Assignment of Oil and Gas Lease—Moot Cases—Dispute Over Private Contracts.**

A protest against a subsequent assignment of the oil and gas lease is moot where that assignee has withdrawn its application for approval of the assignment; and the dispute in this case concerning that assignment, resting on the terms of a private agreement, could and should more appropriately be settled either between the parties or by suit in the courts, rather than by this Department.

**Application for Lands Covered by Outstanding Uncanceled Oil and Gas Leases.**

Since an outstanding uncanceled oil and gas lease is not absolutely void, an oil and gas lease application for lands covered by such lease is invalid and will not be received until the availability of the lands for further application has been noted on the local land-office records.

**Oil and Gas Leases—Reinstatement of Rejected Applications.**

An oil and gas application which, although validly filed, was twice rejected need not be reinstated where no appeals were filed, the case was twice "finally" closed, and there are no extraordinary circumstances or equities outweighing the need for drawing the line of finality in such cases.

**APPEALS FROM THE GENERAL LAND OFFICE<sup>1</sup>**

This case involves the validity of an oil and gas lease on certain public lands of the United States, originally issued to Harry C. Williams. Mrs. Hill appeals (A-24248) from the rejection of her application for an oil and gas lease on these lands (Las Cruces 062812). Mrs. Saunders appeals (A-24255) from the rejection of her application for reinstatement of her previous application for an oil and gas lease on the same lands (Las Cruces 059866). Both Mrs. Hill and Mrs. Saunders seek the cancellation of a 5-year noncompetitive oil and gas lease (Las Cruces 059584), now held on these lands by Messrs. N. S. Williams and T. C. Liddell, and each seeks to have the lands covered thereby leased to her alone. Mr. J. N. Hawkins is protesting against any assignment of the lease by N. S. Williams and Liddell to Shell Oil Company.

<sup>1</sup> Effective July 16, 1946, the General Land Office and the Grazing Service were abolished and their functions were transferred to the Bureau of Land Management, by Reorganization Plan No. 3 of 1946 (11 F. R. 7875, 7876; 7776).

It appears that Hawkins, Liddell, and N. S. Williams, by various assignments, acquired quarter, half, and quarter interests, respectively, in an exchange oil and gas lease covering certain public lands in New Mexico (Las Cruces 032127).<sup>2</sup> On March 27, 1941, Hawkins and N. S. Williams assigned their interests in that lease to Liddell. Within a few months, Liddell relinquished the lease and it was canceled. On December 16, 1941, as soon as the land became subject to new applications, N. S. Williams' brother, Harry C. Williams, filed an application for a lease on the same land in his own name (Las Cruces 059584).<sup>3</sup>

On January 30, 1942, Mrs. Saunders filed her application for an oil and gas lease on the same land (Las Cruces 059866). Since Harry C. Williams' application was prior in time, the lease was issued to him on November 1, 1942; Mrs. Saunders' application was accordingly rejected by the register of the local land office on November 24, 1942. Mrs. Saunders did not appeal, and on January 14, 1943, the register in the regular course closed the case on her application.

Shortly before March 3, 1943, the General Land Office was informed orally by one of the attorneys for Mrs. Saunders that Harry C. Williams, when he filed the application and obtained the lease, was an employee of the Department of the Interior, in the Bureau of Reclamation. Section 9 of the lease provides:

**Unlawful interest.** \* \* \* no officer, agent, or employee of the Department of the Interior, shall be admitted to any share or part in this lease or derive any benefit that may arise therefrom; \* \* \*.<sup>4</sup>

On March 3, 1943, the Commissioner of the General Land Office issued a decision requiring Harry C. Williams to show cause why the lease should not be canceled. On the same day, the Land Office received a letter from Mrs. Saunders requesting reinstatement of her application, accompanied by a tender of the filing fees which had been previously returned to her.

In response to the Commissioner's show-cause order, Harry C. Williams, on April 6, 1943, executed and filed an assignment of his lease to N. S. Williams and Liddell. At the same time, all three of them also executed and filed in the Department affidavits averring, in substance, that Harry C. Williams, who lived in Las Cruces, had merely "for convenience" acted as an agent for N. S. Williams and Liddell, who lived 45 miles away in El Paso, Texas; that N. S. Williams and Liddell were the real and only owners of the lease; that N. S. Williams

<sup>2</sup> T. 23 S., R. 38 E., N. M. P. M., Lea County, New Mexico: sec. 17, NW $\frac{1}{4}$ , S $\frac{1}{2}$ ; sec. 18, all; sec. 30, SE $\frac{1}{4}$ , SE $\frac{1}{4}$ SW $\frac{1}{4}$ ; sec. 33, NW $\frac{1}{4}$ , N $\frac{1}{2}$ SW $\frac{1}{4}$ , lot 4, containing approximately 1,567.03 acres.

<sup>3</sup> Under section 17 of the Mineral Leasing Act (41 Stat. 437, 443, as amended, 46 Stat. 1007; 46 Stat. 1523; 49 Stat. 676; 30 U. S. C. sec. 226).

<sup>4</sup> 43 CFR 192.28 (1940 ed.).

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and Liddell had paid all costs in connection with the lease, as shown by certain canceled checks;<sup>5</sup> that Harry C. Williams was neither paid nor promised "any money or interest in the lease"; that he had no interest in the lease; and that none of them knew that Harry C. Williams was ineligible to hold a lease.

On the basis of this showing, the Department approved the assignment on May 18, 1943, on the express ground that Harry C. Williams "appears to have acquired this lease innocently of the prohibitions stated in section 9, and since he does not appear to have been admitted to any share or part of the lease \* \* \*." The Commissioner, by decision of August 17, 1943, thereupon affirmed the register's action in rejecting Mrs. Saunders' application, denied her request for reinstatement of her application, and again returned her filing fees. She did not appeal, and on December 2, 1943, the case on her application was again closed.

On August 26, 1943, Hawkins filed in the Department a sworn Notice of Claim to a one-fourth equitable interest in the lease. Shortly thereafter, he instituted a suit to secure an assignment of that interest to him.<sup>6</sup> On August 21, 1944, however, the suit was dismissed by consent pursuant to an agreement of that date under which Hawkins agreed to execute a disclaimer of any interest in the lease, and Liddell and N. S. Williams gave Hawkins certain contract rights against them in relation to the lease.<sup>7</sup>

<sup>5</sup> Harry C. Williams paid the filing fee of \$20 on December 16, 1941; a check for \$20 from Liddell to the order of Harry C. Williams dated December 15, 1941, was deposited in the Mesilla Valley Bank on December 18, 1941, after endorsement by Harry C. Williams and one other person. The first year's rental was paid by Liddell's check to the order of the register dated June 23, 1942.

<sup>6</sup> *Hawkins v. N. S. Williams, T. C. Liddell et al.*, No. 5455, District Court of the Fifth Judicial District of the State of New Mexico, in and for Lea County. In this suit Hawkins, relating the history of the respective quarter, half, and quarter interests of Hawkins, Liddell, and N. S. Williams in the previous exchange lease (Las Cruces 032127), alleged that the assignment thereof to Liddell was made pursuant to an agreement that Liddell would hold the lease as trustee for the three of them, their respective equitable interests to be in the ratio of their previous interests; that the relinquishment of that lease and the acquisition of the present lease (Las Cruces 059584) was in trust for the three of them; and that the assignment by Harry C. Williams to Liddell and N. S. Williams, and their refusal to recognize Hawkins' rights thereto, was pursuant to a conspiracy between Liddell and N. S. Williams to defraud Hawkins out of his interest in the property.

<sup>7</sup> Hawkins received the following contract rights against Liddell and N. S. Williams under that agreement: Hawkins would receive a specified sum from the proceeds of a then proposed sale of the lease to one Ellison. If that sale was not consummated, Hawkins would for 90 days thereafter have the exclusive right to sell the lease at a price satisfactory to the parties, or at any price higher than the amount of the then proposed sale to Ellison; but if Hawkins did not obtain a purchaser within that 90-day period, any proposed sale by N. S. Williams and Liddell was to be subject to a 10-day option to Hawkins to purchase the property at the proposed sale price; and Liddell and N. S. Williams would provide merchantable title. The agreement also provided that the proceeds of any sale would be divided in specified proportions between the parties; that N. S. Williams and Liddell would not relinquish the lease to the United States without first tendering an assignment to Hawkins; and that Hawkins would be given an adequate assignment enabling him to assert any rights to a renewal or new preference lease if N. S. Williams and Liddell did not desire to assert any such rights.

On March 16, 1944, Mrs. Hill filed an application (Las Cruces 062812) for a lease on the lands here involved. It was rejected by the register on March 20, 1944, because all the lands were covered by the lease then held by N. S. Williams and Liddell. She thereupon appealed to the Commissioner urging that the lease be canceled on the ground that Harry C. Williams, as an employee of the Department, was ineligible to acquire any interest in it and that the approval of Harry C. Williams' assignment to N. S. Williams and Liddell had been procured by fraudulent affidavits which concealed the fact that Harry C. Williams was the unlawful owner of an undivided interest in the lease to the extent of 67.03 acres. She furnished a copy of a letter from N. S. Williams to Hawkins dated December 24, 1941, in which N. S. Williams, mentioning that Harry C. Williams had filed the application for the land, stated: "I told him we would take care of him." In addition, she submitted a copy of a recorded sworn instrument entitled "Designation of Interest"<sup>8</sup> which Harry C. Williams had executed on October 19, 1942, and which Liddell had filed for recording in the county records. In this instrument, executed while his application for a lease was still pending and just before the lease was issued, Harry C. Williams declared that he held oil and gas lease, Las Cruces 059584, as trustee for the following persons who owned the following ratio of undivided interests:<sup>9</sup>

	<i>Acres</i>
T. C. Liddell.....	625
N. S. Williams.....	625
Harry C. Williams.....	67.03
Ownership to be later designated by N. S. Williams.....	250
	1,567.03

In this document, Harry C. Williams further stated that "Any disposition of these lands and any profits therefrom whether in oil or gas or money shall be divided among the interested parties hereto in proportion to their interests as set forth above." On the same grounds, on February 7, 1945, Mrs. Saunders again filed an application for reinstatement of her twice previously denied application.

On October 3, 1945, Liddell and N. S. Williams executed an assignment of the lease to the Shell Oil Company; Hawkins, on December 7, 1945, filed a protest against its approval, charging that Liddell and N. S. Williams had breached their contract of August 21, 1944,

<sup>8</sup> Document 16914, recorded in county records of Lea County, Lovington, New Mexico, in Book 26, page 492, Miscellaneous Records.

<sup>9</sup> These interests are approximately as follows, expressed in percentage ratios:

	<i>Percent</i>
T. C. Liddell.....	39.8844
N. S. Williams.....	39.8844
Harry C. Williams.....	4.2775
For later designation by N. S. Williams.....	15.9537



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with him; and on May 20, 1946, the Shell Oil Company formally withdrew its application for approval of the assignment.

By decision of October 22, 1945, the Commissioner held (a) that there was insufficient evidence of any prearranged scheme to defraud the Government out of any public lands through oil and gas leases;<sup>10</sup> (b) that there was "no evidence of any prior arrangement or agreement for Harry C. Williams to obtain financial gain by the issuance of the lease"; and (c) that there was no evidence "to show that Harry C. Williams actually retains an interest of some sort in the lease or that the 'Designation of Interest' was made by him with knowledge of the fact that he could not hold it or that the present lessees acted with such knowledge in procuring it to be executed and recorded on the county records." The Commissioner therefore refused to cancel the lease, rejected Mrs. Saunders' application for reinstatement of her application, affirmed the register's decision rejecting Mrs. Hill's application, and required that the assignment from H. C. Williams to N. S. Williams and Liddell be recorded in the county records. The Commissioner also held that Hawkins' Notice of Claim to a one-fourth interest in the lease would not be considered, in view of the fact that his suit against N. S. Williams and Liddell to establish his title to that interest had been dismissed on August 21, 1944.

Separate appeals have been filed by Mrs. Hill (A-24248) and by Mrs. Saunders (A-24255). They repeat the contentions they respectively made to the Commissioner. In addition, Mrs. Hill charges fraud on the part of the local land-office employees in accepting Harry C. Williams' application with knowledge that he was an employee of the Bureau of Reclamation and argues that the lease was void *ab initio*. Hawkins has not appealed from the Commissioner's decision denying consideration to his Notice of Claim to a one-fourth interest in the lease, and that aspect of the case is therefore no longer before the Department.

#### HAWKINS' PROTEST

Since Shell Oil Company has withdrawn its application for approval of the assignment to it, Hawkins' protest is now moot. Moreover, the dispute between Hawkins on the one side and Liddell and N. S. Williams on the other side, each charging the other party with having breached the terms of their agreement of August 21, 1944, is a matter which could and should more appropriately be settled either between the parties or by suit in the courts, rather than by this De-

<sup>10</sup> I. e., by attempts to evade the prohibition against excessive holdings of interests in oil and gas leases in violation of the acreage limitations under section 27 of the Mineral Leasing Act (30 U. S. C. sec. 184).

partment.<sup>11</sup> Hawkins' protest against the proposed assignment of the lease to Shell Oil Company is therefore dismissed.

#### MRS. HILL'S APPLICATION

Mrs. Hill's application was filed on March 16, 1944. At that time all the lands for which she applied were covered by an outstanding uncanceled lease. She argues that the land was open to her application because the lease was void *ab initio*. She cites sections 114, 115, and 116 of the Criminal Code (18 U. S. C. secs. 204, 205, and 206), and *Waskey v. Hammer*, 223 U. S. 85 (1912). The sections of the Criminal Code apply only to contracts of the United States with members of Congress. The *Waskey* case involved the validity of a mining location and a specific statute,<sup>12</sup> which is applicable only to employees of the Bureau of Land Management.<sup>13</sup> This case involves a lease approved by officers of the Government, and Harry C. Williams is an employee of the Bureau of Reclamation. Moreover, the decision followed the general rule that an act done in violation of a statutory prohibition is void; here, nothing done at the time of the issuance of the lease constituted such a violation. Mrs. Hill also points out that when Harry C. Williams filed his application for a lease he failed to file a power of attorney under oath, which the Department's regulations<sup>14</sup> require an agent to file, and she cites the cases of *Edwina S. Elliott*, 56 I. D. 1 (1936); *Sour v. McMahon*, 51 L. D. 587 (1926), and *Witbeck v. Hardeman*, 51 F. (2d) 450, 454 (C. C. A. 5th, 1931).<sup>15</sup> These cases, however, did not relate to, nor did they hold that leases issued by the Department were void *ab initio* because of omission in filing a sworn paper; they dealt only with the validity of the application itself, not of the lease. These cases would be pertinent where the question in issue is whether the Department should recognize an application which was filed without the proper accompanying affidavit; but they are not relevant where the question in issue is whether a lease, which was issued by the Department and whose assignment was later approved by the Department, is to be declared void from the beginning.

In any event, even if it is assumed that the lease was void while it was still in the name of Harry C. Williams, the action of the Department in approving the assignment by Harry C. Williams to Liddell and N. S. Williams placed on the lease the gloss of apparent

<sup>11</sup> Cf. *Elmer K. Nelson*, 59 I. D. 296 (1946).

<sup>12</sup> Sec. 452, Rev. Stat.; 43 U. S. C. sec. 11.

<sup>13</sup> *Franklin George Fox*, 58 I. D. 257 (1942).

<sup>14</sup> 43 CFR 192.23 (1940 ed.).

<sup>15</sup> *Affirmed on other grounds* 286 U. S. 444 (1932).

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validity. Its very existence was a segregation of the land which discouraged the filing of other oil and gas lease applications. To say that such a lease is absolutely void *ab initio* for all purposes is, therefore, to deny reality. The lease, however subject to cancellation it might be, was still outstanding and uncanceled, and at least, insofar as the filing of new applications was concerned, cannot be said to have been void *ab initio*.

The rule has been long established in the Department that an oil and gas application on any lands then covered by an outstanding oil and gas lease is invalid and that no oil and gas lease applications will be received until the availability of the lands for further application has been noted on the local records.<sup>16</sup> Even if the lease were canceled, Mrs. Hill's application would still be invalid, and she can secure no priority by virtue of having filed it. Her application was rightly rejected. There is therefore no need to discuss the charges by N. S. Williams and Liddell that Mrs. Hill's application was filed on behalf of, and at the instigation of, Hawkins.

#### MRS. SAUNDERS' APPLICATION

Mrs. Saunders' first application for a lease (Las Cruces 059866) was filed before the lease was issued. Her application, unlike Mrs. Hill's, was therefore a validly filed application, though junior to the previously filed application of Harry C. Williams. But her application did not remain valid. After the lease was issued, the register rejected her application, she did not appeal, and her case was then closed. She now argues that because she tendered her filing fees on March 3, 1943, with her letter to the Commissioner requesting reinstatement of her rejected application, she should be awarded the lease if the Liddell-Williams lease is canceled. But on August 17, 1943, her request for reinstatement of her application was denied, the decision of the register in rejecting her application was affirmed, and her filing fees returned. Again she did not appeal, and on December 2, 1943, her case was again closed. More than a year then elapsed before she filed; on February 7, 1945, her present application again seeking reinstatement of her already twice-rejected application.

Mrs. Saunders' failure to appeal constituted acquiescence in the decisions of the register and of the Commissioner rejecting her appli-

<sup>16</sup> See *James v. Germania Iron Co.*, 107 Fed. 597 (C. C. A. 8th, 1901); *Martin Judge*, 49 L. D. 171 (1922); *California and Oregon Land Co. v. Hulen and Hunnicutt*, 46 L. D. 55 (1917); *Hiram M. Hamilton*, 38 L. D. 597 (1910); *George B. Pratt*, 38 L. D. 146 (1909); 43 CFR 192.14 (1940 ed.) and 43 CFR 192.43 (1946 Supp.), Circ. 1624, October 28, 1946 (11 F. R. 12956, 12958); *J. Thompson Howell*, A. 23282 (Sacramento 032258), March 13, 1942 (unreported); *Hall v. Stone*, 16 L. D. 199 (1893); *United States v. United States Borax Co.*, 58 L. D. 426, 440 (1944), on Motion for Rehearing.

cation and request for reinstatement and twice closing her case.<sup>17</sup> But even if those decisions or the Department's decision of May 18, 1943, approving the assignment from Harry C. Williams to Liddell and N. S. Williams, were erroneous in the light of the information then available (a question to be discussed later), yet those decisions should be regarded as settling the conflict between the Williams and Saunders applications.<sup>18</sup> After the issuance of an oil and gas lease and the rejection of the conflicting application, the Department will normally not order the cancellation of the lease and reinstate the rejected application, even where the original decision may have been erroneous.<sup>19</sup> The issuance of the lease and the acquiescence therein by the other applicant created an apparently valid segregation of the land which discouraged the filing of other applications. There are here no such extraordinary circumstances or equities as would outweigh the need for drawing the line of finality when an application is twice rejected, no appeal is taken, and the case is twice "finally" closed. We think the decision of the Commissioner rejecting Mrs. Saunders' application for reinstatement of her twice-rejected application was correct.

#### DISTRICT LAND OFFICE EMPLOYEES

While Mrs. Hill's appeal was under consideration by the Department, her attorneys filed charges that "officials of the district land office" participated in "a conspiracy to allow and sustain an entry which should have been denied." An investigation reveals that some employees of the district land office knew of Harry C. Williams' application and of his being an employee of the Department. And they did fail to inform the Department of that fact. But the lease was not issued by the district land office. Under the practice then existing, all oil and gas leases were issued after adjudication by the General Land Office in Washington. The district land office generally performed the routine functions of receiving sworn applications for such leases, together with the required fees, noting them on the district land-office records, checking the status of the lands sought and

<sup>17</sup> *Cummings v. Johnson-Fenner and Murdi*, 52 L. D. 529, 531, 532 (1928); *Macbride v. Stockwell*, 11 L. D. 416 (1890); *Pehling v. Brewer*, 20 L. D. 363, 365, 21 L. D. 65 (1895); *Lillie M. Kelly*, 49 L. D. 659, 662 (1923); *M. T. Myers*, G. L. O. 09845, approved September 24, 1946 (unreported).

<sup>18</sup> *Douglass v. County of Pike*, 101 U. S. 677 (1879); *Gelpcke v. Dubuque*, 1 Wall. (68 U. S.) 175 (1863); *Thomson v. Lee County*, 3 Wall. (70 U. S.) 327 (1865); *Mitchell v. Burlington*, 4 Wall. (71 U. S.) 270 (1866); *Larned v. Burlington*, 4 Wall. (71 U. S.) 275 (1866); *Olcott v. The Supervisors*, 16 Wall. (83 U. S.) 678 (1872).

<sup>19</sup> *M. T. Myers*, G. L. O. 09845, approved by the Department September 24, 1946 (unreported).

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the apparent completeness of the application, and then, if the application was regular on its face and the lands were subject to leasing under the mineral leasing law, the application was forwarded to the General Land Office in Washington along with information as to any conflicts with other entries or applications and other pertinent information.<sup>20</sup> The lease to Harry C. Williams was issued by officials of the General Land Office and the Department in Washington without any awareness of the fact that he was an employee of the Department. The record and file of his application for an oil and gas lease did not, as it then stood, indicate that fact. Thus, even if there had been any conspiracy among officials of the district land office in connection with the application, it is questionable whether the lease could or would have been affected in any way by such conspiracy. But it is irrelevant to speculate on this question because there is no evidence submitted by Mrs. Hill or in the record of the investigation heretofore made by this Department which would support the charge of conspiracy. In any event, however, in view of the disposition of this appeal on other grounds, those charges need not be here considered, relevant though they may be to the internal administration of the Department.

#### THE LEASE AND THE ASSIGNMENT

Section 9 of the lease, withholding from employees of the Department the privilege of being admitted to any share or part in the lease or of deriving any benefit that may arise therefrom, expresses a basic principle of the Department that as a matter of public policy the Department will generally not dispose of any interest in public lands to its employees.<sup>21</sup> The Department has adhered to this policy even where the employee had filed his application for a lease before he became an employee of the Department.<sup>22</sup>

In this case, the lease was issued to Harry C. Williams by officials who did not know that he was an employee of the Department. Its approval, on May 18, 1943, of his assignment of the lease to Liddell

<sup>20</sup> 43 CFR 192.23 (1940 ed.) ; par. 10, Circ. 1386, May 7, 1936, 55 I. D. 506, as amended by G. L. O. Order No. 91, approved by the Department on October 16, 1940.

<sup>21</sup> Memorandum of Assistant Secretary Chapman to the Commissioner of the General Land Office, May 16, 1945 (Salt Lake City 063226) ; letter of Secretary Ickes to the President of the Senate, January 4, 1945 (S. Rept. 195 and H. Rept. 754, 79th Cong., 1st sess.) ; Solicitor Gardner's opinion of March 25, 1943, 58 I. D. 354 ; Solicitor White's memorandum opinion of December 12, 1946. See, also, *Waskey v. Hammer*, 223 U. S. 85, 93 (1912) ; *cf.* act of June 1, 1938 (52 Stat. 609), as amended by the act of July 14, 1945 (59 Stat. 467 ; 43 U. S. C. sec. 682a) ; Manual, United States Bureau of Reclamation (1938 ed.), pars. 76, 79, Personnel, pp. 96, 97.

<sup>22</sup> *Elmer K. Nelson*, 59 I. D. 296 (1946).

and N. S. Williams, expressly states that it was based on the view, then supported by the record, that he had acquired the lease innocently and did not appear to have been admitted to any share or part of the lease. Whether or not this approval was warranted, on the basis that under the evidence as it then stood it might be argued that canceling the lease would onerously penalize seemingly innocent people for an apparently trifling mistake, is now immaterial. The facts now of record have placed an entirely different aspect on the matter.

It is unimportant to speculate as to the nature of the arrangement existing between Harry C. Williams, N. S. Williams, and Liddell at the time the lease was issued, or as to the meaning of the cryptic phrase in N. S. Williams' letter of December 24, 1941, "I told him we would take care of him." What is important is that before the lease was issued on November 1, 1942, the parties had in writing described their relationship to each other and their interests in the lease. Harry C. Williams' designation of October 19, 1942, was prepared by N. S. Williams, signed by Harry C. Williams, and filed by Liddell for recording in the county public records. It conclusively shows that Harry C. Williams, in addition to his technical legal title to the entire lease, had an actual beneficial interest in a part of the lease, together with an agreement that he would receive a share of any profits as compensation for his services as agent for Liddell and N. S. Williams.<sup>23</sup> It is difficult to believe that Liddell and the Williams brothers had no knowledge that Harry C. Williams had an actual interest in the lease and a right to receive a share of any profits resulting from the lease, when they executed and filed their affidavits that Harry C. Williams had acted "without consideration of either money or interest in the lease" and had never been "paid any money for his services nor promised \* \* \* any interest in the lease."<sup>24</sup>

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<sup>23</sup>Section 113 of the Criminal Code (18 U. S. C. sec. 203) provides:

"Whoever, being \* \* \* officer or clerk in the employ of the United States, shall, directly or indirectly, receive, or agree to receive, any compensation whatever for any services rendered or to be rendered to any person, either by himself or another, in relation to any proceeding, contract, \* \* \* or other matter or thing in which the United States is a party or directly or indirectly interested, before any department, \* \* \* bureau, officer, \* \* \* shall be fined not more than \$10,000 and imprisoned not more than two years; and shall moreover thereafter be incapable of holding any office of honor, trust, or profit under the Government of the United States."

<sup>24</sup>When questioned, Liddell admitted that his affidavit was incorrect on this point, and N. S. Williams admitted that he prepared both the Designation of Interest and the various affidavits.

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These affidavits, on which the Department relied in determining whether to approve the assignment from Harry C. Williams to Liddell and N. S. Williams, were plainly false.<sup>25</sup> Had Liddell and the Williams brother revealed that Harry C. Williams had an interest in the lease and an agreement to receive a share of the profits therefrom, the Department would have canceled the lease. Had the concealments and misrepresentations in the Williams-Liddell statements been known to the Department, the assignment would have been disapproved, not only because of the violation of section 9 of the lease which forbids an employee from having any share or benefit in the lease, but also because of the concealment and misrepresentation by the applicants of material facts. Under the applicable regulations (43 CFR 192.42 (1940 ed.)) and subsection 2 (p) of the lease, the lessee could not assign the lease or any interest therein without first obtaining the consent of the Secretary.<sup>26</sup> The Department approved the assignment solely on the basis of the Williams-Liddell concealment of relevant facts and their misrepresentation that the facts were otherwise.

In view of the fact that the Department's approval of the assignment was based upon misrepresentations and the concealment of relevant facts, and since the retention of an interest in an oil and gas lease by an employee of this Department is in plain violation of section 9 of the lease and contrary to the policy of the Department, the approval

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<sup>25</sup> Section 35 (A) of the Criminal Code (18 U. S. C. sec. 80) provides:

"\* \* \* whoever shall knowingly and willfully falsify or conceal or cover up by any trick, scheme, or device a material fact, or make or cause to be made any false or fraudulent statements or representations, or make or use or cause to be made or used any false \* \* \* affidavit, \* \* \* knowing the same to contain any fraudulent or fictitious statement or entry in any matter within the jurisdiction of any department or agency of the United States \* \* \* shall be fined not more than \$10,000 or imprisoned not more than ten years, or both." [See *United States v. Gilliland*, 312 U. S. 86, 91 (1941).]

Section 37 of the Criminal Code (18 U. S. C. sec. 88) provides:

"If two or more persons conspire either to commit any offense against the United States, or to defraud the United States in any manner or for any purpose, and one or more of such parties do any act to effect the object of the conspiracy, each of the parties to such conspiracy shall be fined not more than \$10,000, or imprisoned not more than two years, or both."

See *Glasser v. United States*, 315 U. S. 60, 66 (1942); *Hammerschmidt v. United States*, 265 U. S. 182, 188 (1924).

<sup>26</sup> This provision is required by section 30 of the Mineral Leasing Act (41 Stat. 437, 449; 30 U. S. C. sec. 187).

is subject to revocation, and the lease is subject to cancellation <sup>27</sup> under section 31 of the Mineral Leasing Act.<sup>28</sup>

Harry C. Williams, N. S. Williams, and T. C. Liddell are hereby notified that the lease will be canceled and the approval of the assignment revoked upon the expiration of 30 days after notice of this decision to them.<sup>29</sup> And the Director of the Bureau of Land Management will hereafter accept no application for oil and gas leases on these lands from the said persons or any of them, or from anyone who

<sup>27</sup> Cf.: Federal Communications Comm'n v. WOKO, Inc., 329 U. S. 223 (1946); United States v. Minor, 114 U. S. 233, 239-241 (1885); United States v. Southern Pacific Co., 251 U. S. 1 (1919); McCaskill Co. v. United States, 216 U. S. 504 (1910); Diamond Coal and Coke Co. v. United States, 233 U. S. 236 (1914); Washington Securities Co. v. United States, 234 U. S. 76 (1914); Levers v. Anderson, 153 F. (2d) 1008 (C. C. A. 10th, 1946); Archer v. Securities and Exchange Comm'n, 133 F. (2d) 795 (C. C. A. 8th, 1943); Higgins v. Mills, 22 F. (2d) 913 (C. C. A. 2d, 1927); Roumanian American Winery v. Morgenthau, 152 F. (2d) 452 (C. C. A. 2d, 1945); Thomas J. Molloy & Co. v. Berkshire, 143 F. (2d) 218 (C. C. A. 2d, 1944); Middlesboro Liquor & Wine Co. v. Berkshire, 77 App. D. C. 88, 133 F. (2d) 39 (1942); Great Western Broadcasting Ass'n. Inc. v. Federal Communications Comm'n, 68 App. D. C. 119, 94 F. (2d) 244 (1937); Newark Bay Cereal Beverage Co. v. Wynne, 57 F. (2d) 83 (C. C. A. 3d, 1932); Wynne v. Romonat, 46 F. (2d) 29 (C. C. A. 3d, 1931); National Grain Yeast Corp. v. Mitchell, 51 F. (2d) 500 (C. C. A. 3d, 1931); Bernstein v. Doran, 33 F. (2d) 897 (C. C. A. 3d, 1929); Doran v. Judd, 31 F. (2d) 108 (C. C. A. 3d, 1929); Burns v. Doran, 37 F. (2d) 484 (C. C. A. 3d, 1930); National Broadcasting Co. v. United States, 319 U. S. 190, 222-224 (1943); Steuart & Bro. v. Bowles, 322 U. S. 398, 404-407 (1944); Helvering v. Mitchell, 303 U. S. 391, 399 (1938); Ex Parte Wall, 107 U. S. 265 (1882). See, also, Bugajewitz v. Adams, 228 U. S. 585, 591 (1913); Fong Yue Ting v. United States, 149 U. S. 698, 730 (1893); Hawker v. New York, 170 U. S. 189, 196, 199-200 (1898).

See, also, Department of Agriculture: *In re* Harry T. Silverfarb Co., 3 A. D. 597 (1944); *In re* Bessie Silverfarb, 3 A. D. 880 (1944). Civil Aeronautics Board: Hassen All Easmeil, Docket No. SR-1056 (March 27, 1945). Interstate Commerce Comm'n: Burbidge Common Carrier Application, 14 M. C. C. 412 (1939); Federal Storage Warehouses, Inc., 43 M. C. C. 673 (1944). Office of Price Administration: In the Matter of Tramor Cafeteria, Inc., 3 OPA Op. and Dec. 6215; In the Matter of Maynard Wood, 3 OPA Op. and Dec. 6220; In the Matter of Mark C. Bloome, 3 OPA Op. and Dec. 6208. Securities and Exchange Comm'n: In the Matter of B. W. Sargent, 2 S. E. C. 310 (1937); In the Matter of Securities Exchange Corp., 2 S. E. C. 760 (1937); In the Matter of Charles E. Rogers, 3 S. E. C. 597 (1938); In the Matter of L. P. Atwater, 3 S. E. C. 763 (1938); In the Matter of Mine Sales, Inc., 5 S. E. C. 574 (1939).

<sup>28</sup> The lands covered by the lease are not known to contain valuable deposits of oil or gas and the lease was issued after August 21, 1935, under the provisions of section 17 of the act. As to such leases, section 31 of the Mineral Leasing Act, as amended by section 9 of the act of August 8, 1946 (60 Stat. 950, 956), provides as follows:

"Any lease issued after August 21, 1935, under the provisions of section 17 of this Act shall be subject to cancellation by the Secretary of the Interior after thirty days' notice upon the failure of the lessee to comply with any of the provisions of the lease, unless or until the land covered by any such lease is known to contain valuable deposits of oil or gas. Such notice in advance of cancellation shall be sent the lease owner by registered letter directed to the lease owner's record post-office address, and in case such letter shall be returned as undelivered, such notice shall also be posted for a period of thirty days in the United States land office for the district in which the land covered by such lease is situated, or in the event that there is no district land office for such district, then in the post office nearest such land."

<sup>29</sup> Notice of this decision will be given as described in section 31 of the Mineral Leasing Act.



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acts as his or their agent or nominee, or has agreed to admit them or any of them to any share or benefit in the lease or proceeds thereof.

As herein modified, the decision appealed from is affirmed.

WARNER W. GARDNER,  
*Assistant Secretary.*

### GENERAL PETROLEUM CORPORATION ET AL.

A-24222

*Decided January 27, 1947*

#### Oil and Gas Leases—Unitization—Rental.

A "discovery" rental of \$1 per acre is chargeable on noncompetitive oil and gas leases committed to a unit agreement under which a discovery is made although no part of the leased lands lies within any participating area established for the unit.

#### Oil and Gas Leases—Extension of Term by Unitization.

In view of the standard provision contained in unit agreements for the consolidation of drilling and producing requirements, it has been the consistent practice of the Department to treat as extended by production in the unit area all unitized noncompetitive leases regardless of whether or not the leases may be considered situated on the known geologic structure of a producing field.

#### Departmental Practice—Ratification by Congress.

The departmental practice relative to the extension of noncompetitive leases by unitization was in effect ratified by Congress in enacting the act of August 8, 1946 (60 Stat. 950).

#### Rentals and Royalties—Unitized Leases.

The concept of unitization as creating in effect a single lease for the purposes of operations and production does not require that the separate identity of unitized leases be disregarded for the purpose of crediting royalties on rentals.

#### APPEALS FROM THE GENERAL LAND OFFICE<sup>1</sup>

These appeals involve the question whether a \$1 an acre "discovery" rental may be charged on noncompetitive oil and gas leases committed to a unit agreement where no part of the leased lands lies within any participating area established for the unit. At the outset it may be noted that since August 8, 1946, the question has ceased to have general importance. On that date, the Mineral Leasing Act (41 Stat. 437; 30 U. S. C. sec. 181 *et seq.*) was amended to provide that the minimum royalty or discovery rental under any unitized lease shall be payable

<sup>1</sup> Effective July 16, 1946, the General Land Office and the Grazing Service were abolished and their functions were transferred to the Bureau of Land Management, by Reorganization Plan No. 3 of 1946 (11 F. R. 7875, 7876; 7776).

only with respect to land sharing in the allocation of oil or gas under the unit plan, i. e., land in a participating area (sec. 17 (b), added by act of August 8, 1946, 60 Stat. 950, 952). The decision of the question in this case is narrowly limited to rental charges on unitized leases for periods prior to that date.

On August 3, 1938, the Department approved the Cole Creek unit agreement, effective September 1, 1938. Appellant General Petroleum Corporation was designated unit operator. The unit area embraced approximately 18,720 acres, of which 12,454 acres were included in the following Federal oil and gas leases:

Serial No.	Lessee	Date issued	Acreage in unit
Cheyenne 054525 (a).....	General Petroleum.....	June 20, 1938.....	240
Cheyenne 054525 (b).....	do.....	do.....	720
Cheyenne 060331.....	Peter Nicolaysen.....	Sept. 11, 1937.....	2,396
Cheyenne 060424.....	A. L. Cilley.....	July 9, 1937.....	2,393
Cheyenne 060430.....	John McDermott.....	do.....	800
Cheyenne 060433.....	O. C. White.....	do.....	160
Cheyenne 060329.....	George White.....	do.....	1,755
Cheyenne 060330.....	Fred P. Moore.....	Aug. 7, 1937.....	2,381
Cheyenne 060434.....	C. G. Dugan.....	July 9, 1937.....	999
Cheyenne 060437.....	C. M. Bettinger.....	do.....	600
			12,454

The last four leases are the subject of these appeals.

Except for the first two leases, which are 20-year leases issued under section 14 of the Mineral Leasing Act (49 Stat. 676; 30 U. S. C. sec. 223) as a reward for discovery, the leases are all 5-year noncompetitive leases issued under section 17 of the act, as amended in 1935 (49 Stat. 676; 30 U. S. C. sec. 226). With respect to rentals the latter leases provide that the lessee shall—

\* \* \* pay the lessor in advance for each acre or fraction thereof, a rental of 50 cents for the first lease year beginning on the first day of the month in which the lease issues, and a rental of 25 cents for each subsequent lease year beginning prior to discovery of a valuable deposit of oil or gas within the limits of the geologic structure on which all or part of the leased lands are situated, and one dollar for each lease year beginning on or after such discovery, the rental so paid for any one lease year to be credited on the royalty for that year: \* \* \*. [Sec. 2 (d).]

Around May 5, 1938, and prior to the approval of the unit agreement, discovery was made on land then included in a permit held by General Petroleum; leases 054525 (a) and (b) were issued as a result of the discovery. On the effective date of the unit agreement, all of the noncompetitive leases except the Nicolaysen lease were in their second lease-year and had paid rental for that year at the rate of 25 cents per acre. Thereafter, except for the O. C. White lease which was relinquished during its second lease-year, they continued to pay rental at that rate until July 25, 1940. Then the following series of

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actions took place with respect to the Nicolaysen, Cilley, and McDermott leases, the three noncompetitive leases not involved in these appeals. On July 25, 1940, upon the basis of a report from the Geological Survey that the situation of part of the Cilley lease within the known geologic structure of the Cole Creek field was reasonably established around May 5, 1938, by the discovery on the General Petroleum lands, the General Land Office demanded a \$1 rental for the lease-year beginning in 1938. General Petroleum, obligated as unit operator to pay rentals on the leases, appealed, contending in effect that only participating acreage should pay the \$1 rental. The Department affirmed the Land Office, denying also General Petroleum's application for a waiver of rentals on all the nonparticipating lands in all of the leases. *A. L. Cilley*, A. 22889, November 8, 1943 (unreported). The Company thereupon complied with the decision and has continued to pay the rental on the \$1 basis.

On November 18, 1940, the Land Office had also demanded \$1 rental on the Nicolaysen lease commencing September 11, 1940, on the ground that a discovery on the Cilley lease on April 24, 1940, had established the situation of part of the Nicolaysen lease on the known geologic structure of the Cole Creek field. General Petroleum appealed this decision but complied when the Department's decision in the *Cilley* case was rendered. Upon a third demand of the Land Office, dated July 18, 1944, the Company also paid \$1 rental on the McDermott lease commencing July 1, 1939. The demand was based on the ground that in the *Cilley* decision the Department had held that rental on all the acreage in the unit agreement must be paid at the \$1 rate.

The Cilley and Nicolaysen leases were included in the initial participating area for the Shannon zone, approved May 20, 1941, but the McDermott lease was not included until an enlargement of the area was approved by the Department on October 31, 1944, effective April 1, 1944. The Cilley lease was also included in the initial participating area for the Dakota-Lakota zone, approved August 19, 1941, and the Nicolaysen lease was included in a revision of the area which became effective on August 1, 1943.

Meanwhile, the George White, Moore, Dugan, and Bettinger leases, the subjects of these appeals, were paying rental at the 25-cent rate. But at the time the Shannon participating area was revised to include part of the McDermott lease, i. e., on April 1, 1944, it also brought in part of the Dugan lease. For this reason, the Land Office, on December 19, 1944, stated that part of the Dugan lease was to be considered as being on the known geologic structure of the Cole Creek field as of April 1, 1944, and that consequently the \$1 rental became due for

the lease-year beginning July 9, 1944. This action, it will be noted, was inconsistent with the Commissioner's prior decision that year in the case of the McDermott lease. The Commissioner had asked for the \$1 rental on the McDermott lease at a time when it was not included in any participating area and had related his demand back to July 1, 1939.

On August 6, 1945, the Commissioner announced that his decision on the Dugan lease was in error. He pointed out that because of the valuable discovery made in the unit area prior to approval of the unit agreement, Dugan's lease did not expire at the end of the initial 5-year term but was extended for the life of the plan. This extension, he said, was provided for under paragraph 17 of the agreement and was allowed on the theory that all leases within the unit plan are consolidated for operating purposes; that a discovery on one is for the benefit of all; and that all are considered as being constructively on the producing structure on which the discovery well is located. He therefore held that the \$1 rental was due on the first day of the lease-year following approval of the unit agreement, namely, July 9, 1939. In three other decisions, dated the same day and assigning the same grounds, the Commissioner called for the \$1 rental on the George White, Moore, and Bettinger leases. The rental demanded on the four leases totaled \$28,232.63.

From these decisions, General Petroleum on its behalf as unit operator and on behalf of the four lessees has filed identical appeals. The Company contends that the decisions are contrary to (1) section 17 of the Mineral Leasing Act, the terms of the lease, and the regulations under which they were issued; (2) departmental interpretations of the act and Solicitor's opinions with respect to rental obligations; and (3) basic principles and purposes of unitization. It further asserts that the decisions are void because rendered by the Commissioner without notice and hearing.

Appellant's principal argument runs as follows: Section 17 of the act provides for a minimum rental on leases of 25 cents per acre, which rental is not to be waived, suspended, or reduced until a valuable discovery is made on the lease; in that event rental is to be credited on royalty. The section further provides that 5-year non-competitive leases are to be issued where the lands leased are not on the known geologic structure of a producing oil or gas field. In the Department's regulations governing section 17 leases, provision was made for a \$1 an acre rental only after a commercial discovery was made on the leased lands (par. 15, Circ. No. 1386, 55 I. D. 502, 520). And the lease terms require the \$1 rental only after a discovery on the geologic structure on which all or part of the leased lands are situated. These provisions, appellants assert, contemplate that the

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\$1 rental is not to accrue on the leases in question until production is obtained by drilling on the lands covered by the leases or they are proved to be capable of production upon the basis of geologic facts. Since there has been no such drilling, and since developments in the unit area have conclusively demonstrated that the leases are unproductive, being outside of the known geologic structure of the Cole Creek field, appellants contend that it is erroneous to charge the leases with the \$1 rental.

The force of appellants' argument may be conceded with respect to nonunitized leases, but it completely ignores the effect of unitization. Under section 17 of the Mineral Leasing Act as amended in 1935, *supra*, noncompetitive leases are issued "for a period of five years and so long thereafter as oil or gas is produced in paying quantities." Since there has been no production from the leases under consideration, they would have expired in 1942 had they not been unitized. In section 17 of the Cole Creek agreement, however, the Secretary agreed and consented that during the life of the agreement—

\* \* \* the prospecting, drilling, and producing operations performed by the unit operator upon any lands subject hereto will be accepted and deemed to be operations under and for the benefit of all such leases; that suspension of operations or production on any such lease shall be deemed not to have occurred if there be operations or production on any part of the unit area subject to this agreement; that no such lease shall be deemed to expire by reason of failure to produce wells situated on land therein embraced; \* \* \*

In 1940, the first year in which 5-year noncompetitive leases issued under section 17, as amended in 1935, could expire, the Department specifically considered the effect which the quoted language would have upon the term of such leases. Construing the language as consolidating the producing provisions of all unitized leases and regarding such consolidation as the very essence of unitization, the Department held that the effect of the language was to extend the term of unitized noncompetitive leases for so long as oil or gas was produced in paying quantities from any part of the unit area (letter of March 6, 1940, from Director, Geological Survey, to Secretary, recommending approval of Government Canyon unit agreement, approved by Acting Secretary on August 6, 1940). Ever since that time, the Department has adhered to that ruling and has treated as extended by production in the unit area all unitized noncompetitive leases regardless of whether or not any portion of such leases was included in a participating area and regardless of whether or not the leases could be considered situated on the known geologic structure of the producing field established by the discovery. See letter from Commissioner, General Land Office, to Messrs. Vogelsang *et al.*, approved by Assistant Secretary Chapman on August 8, 1941 (Cheyenne 040367). In

accordance with this practice, the leases in question were continued beyond the expiration of their primary term in 1942, and appellants fully acquiesced in such extensions.

The Department further followed its view that unitized leases are to be treated as in effect a single lease for purposes of operations and production, in promulgating regulations under the act of December 24, 1942 (56 Stat. 1080; 30 U. S. C. sec. 223, note). That act provided that upon a discovery of a new oil or gas field or deposit upon any lease issued under the Mineral Leasing Act, the royalty obligation of the *lessee who drilled the discovery well* should be 12½ percent as to production from the lease for 10 years following the discovery. Obviously, under the act, if a new deposit was discovered on one lease and a well was later drilled to the same deposit on a second lease, only the first lease would be entitled to the flat 12½ percent rate. But in issuing regulations under the act (43 CFR, Cum. Supp., 192.56a-192.56g, May 3, 1943), the Department provided that if a new discovery was made in a unit area, the benefits of the flat rate would be extended to all unitized leases (43 CFR, Cum. Supp., 192.56c). Thus, in the example given, if the two leases were unitized, the second lease would also pay only a flat 12½ percent royalty. This result reasonably flows from the view that unitized leases are in effect a consolidated lease for purposes of operations and production.

The Department's practice in so regarding unitized leases need not stand on its own, however, for the Congress in effect has recently confirmed it. When S. 1236, the bill which became the act of August 8, 1946, *supra*, was introduced in the Seventy-ninth Congress, it contained nothing on the extension of unitized leases issued under section 17, as amended in 1935. In its report of March 15, 1946, to the Senate Public Lands Committee on the bill, the Department urged the inclusion of an extension provision, stating that, "In fact, the Department has been following the practice of recognizing such extensions. The proposed substitute [bill submitted by the Department] has been so drafted as to expressly sanction this practice." (S. Rept. No. 1392, 79th Cong., 2d sess. (1946), p. 10.) Also, in explaining the substitute bill, the Assistant Commissioner of the General Land Office told the Senate Committee that the purpose of the proposed provision was "to ratify the Department's practice of extending such leases which is based on the theory that all leases committed to a plan must be considered as a unit." (Hearings on S. 1236, pt. 2, p. 260, Senate Public Lands Committee, 79th Cong., 2d sess. (1946).) The Committee reported out an amended bill containing the Department's suggested provision, and it was enacted without change. It reads as follows:

Any other lease [than a 20-year lease] issued under any section of this Act which is committed to any such [unit] plan that contains a general provision

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for allocation of oil or gas shall continue in force and effect as to the land committed so long as the lease remains subject to the plan, provided oil or gas is discovered under the plan prior to the expiration date of the primary term of such lease. [Section 17 (b), as added by act of August 8, 1946, *supra*.]

Prior to August 8, 1946, under the terms of the leases and the regulations referred to by appellants, all producing leases were required to pay rental at the \$1 rate. There were no producing leases which paid at the 25-cent rate. Since the four leases in question were treated as producing leases for purposes of extension, it follows that the rental provided for producing leases should be paid. They cannot reasonably be regarded as producing for extension purposes and nonproducing for rental purposes.

It is true that Congress has decided that the \$1 rental shall no longer be charged on the nonparticipating portions of unitized leases. In section 17 (b), immediately following the extension provision, Congress provided by the act of August 8, 1946, that—

\* \* \* The minimum royalty or discovery rental under any lease that has become subject to any cooperative or unit plan of development or operation, or other plan that contains a general provision for allocation of oil or gas, shall be payable only with respect to the lands subject to such lease to which oil or gas shall be allocated under such plan. \* \* \*

In adding this provision, Congress was aware that the Department was charging the \$1 rental on all unitized land in a productive unit. As a matter of fact, in the Hearings held on S. 1236, Mr. J. M. Jensen, assistant secretary of the General Petroleum Corporation, appeared before a Subcommittee of the Senate Public Lands Committee at Denver, Colorado, on August 31, 1945, and discussed this very case. (Hearings on S. 1236, pt. 1, pp. 206-210, Senate Public Lands Committee, 79th Cong., 1st sess. (1945).) Yet, significantly, in adopting the provision quoted, Congress did not make it retroactive but simply prospective in operation. That statutes are not to be given a retroactive application in the absence of the clearest mandate is an established rule of statutory construction. *Claridge Apartments Co. v. Comm'r*, 323 U. S. 141, 164 (1944); *Hassett v. Welch*, 303 U. S. 303, 314 (1938). Certainly there is no such mandate indicated in the language quoted.<sup>2</sup> In the absence of any evidence of congressional intent to make the provision retroactive, either in the words employed

<sup>2</sup> Congress has made it clear when it intended a statute to operate retroactively to change a prior administrative ruling. For example, in the act of August 13, 1940 (54 Stat. 785), Congress amended the Railroad Retirement Act and other acts to exclude from their coverage certain employees who had been held by the Railroad Retirement Board to be covered by the acts. See S. Rept. No. 1744, 76th Cong., 3d sess. (1940). In making the amendments, Congress not only amended the acts, effective as of the date of their enactment, but added a special section to provide that the laws amended "shall operate as if each amendment herein contained had been enacted as a part of the law it amends, at the time of the original enactment of such law." (Sec. 4 (a).)

or in the legislative history, it must be concluded that the provision was intended to operate prospectively only.

In thus legislating only for the future, it may reasonably be said that Congress acquiesced in the Department's views as to the effect of unitization upon the rental obligations of leases prior to August 8, 1946. Indeed, the failure of Congress to direct a change in practice for prior cases, when this very case had been brought to its attention, may be said to constitute a ratification or implied approval of the Department's views. Thus, it has been held that where Congress modifies a departmental ruling only in part, such action is cogent evidence of congressional approval of the ruling to the extent that it has not been modified. *United States ex rel. United States Borax Co. v. Ickes*, 98 F. (2d) 271, 281 (App. D. C., 1938), *cert. denied* 305 U. S. 619.

Appellants contend that if they are required to pay rental at the \$1 rate on nonparticipating leases, they should be permitted to offset such rentals against the royalties paid the Government from the entire unit area. This result should follow, they argue, if the unit area is considered to be in effect a single lease. The argument overlooks the fact that while integration of drilling, development, and producing operations on all unitized leases is essential to the success of unitization and leases may therefore be considered consolidated for those purposes, the merger of leases to permit crediting of rentals on royalties is not essential to unitization any more than the merger of title to all unitized leases. In other words, leases do not completely lose their identity when they are unitized. Thus, the usual unit agreement provides that royalties on production allocated to leases are to be paid at the rates prescribed in the respective leases (sec. 12, Cole Creek agreement). Lessees remain liable for the payment of rentals and royalties on their respective leases. A single unitized lease may be canceled for violations of the act, regulations, or lease terms without affecting other unitized leases; conversely a lease may not be canceled merely because another lease in the unit is in default.

Administratively, the crediting of all rentals on all royalties would work out satisfactorily only where total royalties exceeded total rentals. The practice could not be sustained in the converse situation. For example, suppose a unit area composed of ten 100-acre leases had a participating area of 200 acres which included 50 acres each of four leases, leaving six leases wholly nonparticipating. Suppose that royalties on the production allocated to the four participating leases totaled \$500, more than enough to cover the \$400 rental due on the four leases but far short of the \$1,000 rental due on the entire unit area. How would the rentals and royalties be paid? It would obvi-



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ously be unfair to require each of the 10 leases to pay \$100 rental and each of the four participating leases to pay, in addition, \$125 in royalties, making total royalties and rentals \$1,500. In fact, it would appear plainly contrary to section 17 of the Mineral Leasing Act as amended in 1935, which provides for crediting of rentals on royalties,<sup>3</sup> to refuse to credit the rentals on the four participating leases against the royalties payable on production allocated to these leases. A second alternative would be to have all 10 leases share in the payment of the royalties, but this is also unfair because only four leases share in the production. The six nonparticipating lessees would strenuously object to paying royalties on production that was not allocated to them. This approach, in effect, would disregard the concept of allocation of production which is an integral part of unit agreements. The third and only other alternative would be to credit the rentals payable on the four participating leases on the royalties payable on those leases and then to credit the remaining \$100 in royalty payments on the \$600 rental due on the six nonparticipating leases. But this approach would recognize the separate identity of leases for rental-crediting purposes; in fact, the crediting of rentals on participating leases against royalties payable on production allocated to those leases is the practice now followed by the Department. It is clear, therefore, that appellants' suggestion would be completely unworkable in cases where total rentals exceeded total royalties. Yet, there is no logical basis for following different rental-crediting practices depending upon whether or not royalties exceeded rentals.

The other arguments advanced need little consideration. Appellants claim that the Commissioner's decisions are contrary to departmental decisions and Solicitor's opinions with respect to rental obligations and rental relief on unitized leases. They cite one Solicitor's opinion of June 4, 1937, in 56 I. D. 174. This opinion had nothing to do with the present case, holding merely that rental on nonparticipating leases would be suspended if operations and production were suspended on such leases pursuant to section 39 of the Mineral Leasing Act (47 Stat. 798; 30 U. S. C. sec. 209). There has been no suspension on the leases in question and there could be none in view of the fact that section 17 of the Cole Creek agreement, quoted *supra*, expressly provides that suspension of operations and production on any lease shall be deemed not to have occurred if there be operations and production on any part of the unit area. There have been continuous operations and production in the unit area since 1938. Fur-

<sup>3</sup> " \* \* That the rental paid for any one year shall be credited against the royalties as they accrue for that year: \* \* \*."

thermore, the Solicitor's opinion was rendered at a time when the continuance of leases by unitization was not yet a question.

Appellants contend that the decisions are contrary to the basic principles of unitization, because in establishing a unit, to be sure that all eventually productive acreage is included, it is necessary to include some nonproductive lands. Appellants apparently feel that to charge a \$1 rental on such land would be to deter its being included in the unit. However this may be, it cannot affect the legal consequences of unitization.

As for the contention that notice and hearing was not given appellants, it suffices to say that a full opportunity has been given appellants to present their case on these appeals. *Cf. Dorothy Bassie et al.*, 59 I. D. 235 (1946).

It is to be deplored that such a long delay elapsed before the demand for rentals at the \$1 rate was made on appellants. However, appellants were not completely without notice prior to August 6, 1945. As early as 1942, when appellants' leases were continued beyond their primary terms, appellants might have known that the \$1 rental was due since the leases could be extended only on the theory that they were producing leases. In any event, in his decision of July 18, 1944, requiring \$1 rental on the then nonparticipating McDermott lease, the Commissioner made it clear that the \$1 rental was due on all the unitized leases. With this knowledge, appellant General Petroleum Corporation without protest paid the \$1 rental on the lease back to July 1, 1939. It is surprising, therefore, that it is now attacking the Commissioner's decisions of August 6, 1945, which made the same requirements.

Appellants have not been without benefit by reason of the unitization of their leases. They have had the basic financial advantage of unitized development, they have been able to hold 5,745 acres of land, disregarding partial relinquishments, without acreage charge for over 7 years, they have had their leases extended beyond their primary term despite the lack of actual production from the leases, and they would have been entitled to the flat 12½ percent royalty benefits of the act of December 24, 1942, *supra*, had a new discovery been made in the unit area.

For the reasons given, it must be concluded that the decisions of the Commissioner were correct and they are therefore affirmed.

WARNER W. GARDNER,  
*Assistant Secretary.*

# OWNERSHIP OF MINERALS IN PATENTED LANDS WITHIN THE UINTAH AND OURAY INDIAN RESERVATION, UTAH

## Indian Lands—Order Restoring Lands to Tribal Ownership—Minerals Reserved to the United States.

The order of August 25, 1945, restoring to tribal ownership "all lands which are now or may hereafter be classified as undisposed-of opened lands of the Uintah and Ouray Reservation" includes minerals reserved to the United States under patents issued for the surface of the opened lands of the reservation.

M-34836

JANUARY 27, 1947.

### TO THE SECRETARY.

By memorandum of May 7, 1946, the Acting Assistant Commissioner of the General Land Office, now the Bureau of Land Management, inquired whether the minerals reserved to the United States under patents issued for the surface of the opened lands of the Uintah and Ouray Indian Reservation, Utah, have been restored to tribal ownership or remain subject to disposal under the mining and mineral leasing laws. Because the Office of Indian Affairs had indicated that the Indians have a vital interest in the question presented, that Office was invited to present its views in the matter. Those views are embodied in the \* \* \* memorandum of August 16, 1946.

The minerals in question are included in lands which were set apart as a reservation for the Indians of Utah.<sup>1</sup> Allotments were made to the Indians entitled to allotment within the area, and the balance of the lands, with exceptions not here material, were restored to the public domain pursuant to the act of May 27, 1902, as amended.<sup>2</sup> The amendatory act of March 3, 1905,<sup>3</sup> authorized the disposition of the unallotted lands under the general provisions of the homestead and town-site laws of the United States. All lands undisposed of at the expiration of 5 years were to be sold for cash.

The lands were opened to entry, settlement, and disposition under the general provisions of the homestead and town-site laws by Presidential proclamation of July 14, 1905,<sup>4</sup> without the consent of the Indians having been formally obtained.<sup>5</sup> The proceeds of the entries and sales of the lands restored to the public domain, after reimbursing the United States for money advanced to the Indians, were to be used for the benefit of the Indians.

<sup>1</sup> Executive order of October 3, 1861 (1 Kappler 900): act of May 5, 1864 (13 Stat. 63).

<sup>2</sup> 32 Stat. 245, 263, 264; 32 Stat. 982, 998; 33 Stat. 189, 207.

<sup>3</sup> 33 Stat. 1048, 1069.

<sup>4</sup> 34 L. D. 1.

<sup>5</sup> See 34 L. D. 306, 311 (1905).

Although the lands were restored to the public domain, they were subject to disposition only under the act of May 27, 1902, as amended. Homestead entrymen, contrary to the usual custom, were required to pay for the land entered at \$1.25 per acre, and the State of Utah was declared to have no right in the lands under its grant in support of schools.<sup>6</sup>

Patents for at least some of the lands in the area which were disposed of contained reservations of minerals underlying the lands in favor of the United States.<sup>7</sup> The question is whether these reserved minerals have been restored to tribal ownership.

By the act of May 27, 1902, *supra*, as amended, legal title to the opened lands passed to the United States. The beneficial title remained in the Indians. The United States merely held the lands, until final disposition thereof, as trustee for the Indians. *Paul S. Hanson v. United States*, 153 F. (2d) 162 (C. C. A. 10th, 1946); *Ash Sheep Company v. United States*, 252 U. S. 159 (1920). The act of 1902, as amended, contains no indication of an intent to extinguish the interest of the Indians in the mineral estate. The act contains no declaration that title to the minerals shall vest absolutely in the United States, nor does it make any provision for the payment of compensation to the Indians for their interest in the minerals. In the absence of such provisions, it would seem to be clear that the United States, after the enactment of the act, continued to hold the title to the surface and to the underlying minerals in trust for the Indians. Since the beneficial interest of the Indians could be terminated only by or under authority of the Congress, the reservation of minerals to the United States by the patents must be regarded as inuring to the benefit of the Indians. In other words, legal title to the minerals underlying the patented lands remained in the United States, and the beneficial title remained in the Indians.

Large areas of the land opened to disposition under the 1902 act, as amended, as well as other large areas of opened Indian lands, remained undisposed of at the time of the passage of the act of June 18, 1934.<sup>8</sup> Section 3 of that act contains the following provision:

The Secretary of the Interior, if he shall find it to be in the public interest, is hereby authorized to restore to tribal ownership the remaining surplus lands

<sup>6</sup> 33 L. D. 610 (1905); 34 L. D. 306.

<sup>7</sup> One patent which has been brought to my attention (Patent No. 689923) contains a reservation in favor of the United States of "all oil and gas and all shale or other rock valuable as a source of petroleum and nitrogen in the lands so patented." The reservation was evidently inserted in the patent pursuant to the act of July 17, 1914 (38 Stat. 509), which act authorized the appropriation, location, selection, entry, or purchase under the nonmineral land laws of lands withdrawn or classified as phosphate, nitrate, potash, oil, gas, or asphaltic minerals, or which are valuable for those deposits with a reservation to the United States of the deposits on account of which the lands were withdrawn or classified.

<sup>8</sup> 48 Stat. 984; 25 U. S. C. sec. 461 *et seq.*

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of any Indian reservation heretofore opened, or authorized to be opened, to sale, or any other form of disposal by Presidential proclamation, or by any of the public-land laws of the United States: *Provided, however*, That valid rights or claims of any persons to any lands so withdrawn existing on the date of the withdrawal shall not be affected by this Act: \* \* \*.

Shortly after the passage of the act of June 18, 1934, the Commissioner of Indian Affairs recommended that lands which the United States was holding as trustee for the Indians, but which had been opened to entry, sale, or other form of disposition under the public-land laws, or which were subject to mineral entry and disposal under the mining laws of the United States, should be temporarily withdrawn to prevent their further disposition until such time as the matter of their permanent restoration to tribal ownership could be given appropriate consideration. The Commissioner made it clear that the intention was to withdraw only lands the proceeds of which, if sold, would be deposited in the Treasury of the United States for the benefit of the Indians. Included in the recommendation for temporary withdrawal were the opened Uintah and Ouray lands. On September 19, 1934, the recommendation of the Commissioner was approved and the lands were temporarily withdrawn.<sup>9</sup>

Thereafter, on August 25, 1945, the Secretary of the Interior found that restoration to tribal ownership of "all lands which are now or may hereafter be classified as undisposed-of opened lands of the Uintah and Ouray Reservation" would be in the public interest, and he restored said lands to tribal ownership for the use and benefit of the Ute Indian Tribe of the Uintah and Ouray Reservation in Utah.<sup>10</sup>

A question has been raised as to whether the order of August 25, 1945, can be said to have restored to tribal ownership minerals underlying the lands within the area the surface of which had already been disposed of under the nonmineral land laws. This doubt is based upon the fact that the lands which were restored by the order of August 25, 1945, are described as "approximately 217,000 acres of unallotted lands" and "a limited additional acreage of land of similar character" which "may later be included within this class of undisposed-of opened land." It is contended that, literally construed, the order restored only the 217,000 acres of unallotted lands mentioned therein and such other lands as might later be included as undisposed-of lands by relinquishment and cancellation of homestead entries, particularly since the order makes no mention of minerals or mineral lands.

I do not believe that the order of August 25, 1945, is susceptible of the construction mentioned in the preceding paragraph. The

<sup>9</sup> 54 I. D. 559.

<sup>10</sup> 10 F. R. 12409.

descriptive language quoted in the preceding paragraph is found in the preamble or "Whereas" clauses of the order. That language, like the preamble of a statute, cannot control words employed in the body of the order.<sup>11</sup> The controlling part of the order is that part following the "Now, therefore" clause. These words are—

\* \* \* by virtue of the authority vested in the Secretary of the Interior by sections 3 and 7 of the act of June 18, 1934 (48 Stat. 984), I hereby find that restoration to tribal ownership of all lands which are now or may hereafter be classified as undisposed-of opened lands of the Uintah and Ouray Reservation will be in the public interest, and the said lands are hereby restored to tribal ownership \* \* \*.

The order restores "all lands which are now or may hereafter be classified as undisposed-of opened lands" of the reservation. The minerals in place are a part of the land. The fact that a lesser estate, the surface, has been carved out of the land and disposed of does not make that which is left, the mineral estate, any the less "lands." *British-American Oil Producing Co. v. Board of Equalization of Montana et al.*, 299 U. S. 159 (1936).

One of the purposes of the order was to insure closer administrative control of the tribe's property in the interest of better conservation practices. As pointed out above, the beneficial title to the minerals has always been in the Indians. Certainly the Indians' mineral estate can be administered more effectively if the whole estate—the minerals underlying the patented lands, as well as those underlying the undisposed-of lands—can be administered as a unit rather than by having the minerals underlying the patented lands administered under one set of laws and regulations and the minerals underlying the unpatented lands administered under another set of laws and regulations.

The order should be construed in such a manner as will result in the accomplishment of its broad purpose. That was to restore to tribal ownership all lands, or interests in lands, to which the superior rights of third parties had not attached.

Therefore, as previously indicated, it is my opinion that the minerals underlying the patented lands within the Uintah and Ouray Indian Reservation were restored to tribal ownership by the order of August 25, 1945.

\* \* \* \* \*

MASTIN G. WHITE,  
Solicitor.

<sup>11</sup> In *re American States Public Service Co.*, 12 F. Supp. 667 (1935), modified *Burco, Inc., v. Whitworth*, 81 F. (2d) 721 (C. C. A. 4th, 1936), cert. denied 297 U. S. 724; *Cf. Panama Refining Co. v. Ryan*, 293 U. S. 388 (1935); *Schechter Poultry Corp. v. United States*, 295 U. S. 495 (1935).

**ROY FOREHAND  
R. R. MARSH**

A-24428

*Decided January 30, 1947*

**Mineral Leasing Act—Sodium—Statutory Preference Right to Lease but not to Permit.**

While section 24 of the Mineral Leasing Act of February 25, 1920, as amended (41 Stat. 437, 447; 30 U. S. C. sec. 262), grants to a permittee a preference right to a *lease*, upon a showing of a valuable discovery, there is no statute providing for preference rights in the issuance of sodium prospecting *permits*.

**Sodium—Permit Applications—Simultaneous Filing—Public Drawing.**

The priority of simultaneously filed permit applications is to be determined by a public drawing.

**Sodium—Preference Lease—Necessity for Further Prospecting.**

No preference lease is to be issued if it appears that further prospecting will be necessary to determine the presence of sodium in workable quantity and quality in the land.

**APPEAL FROM THE BUREAU OF LAND MANAGEMENT**

Roy Forehand has appealed from the decision of the Bureau of Land Management, dated July 19, 1946, which dismissed his protest against the issuance of a sodium permit to R. R. Marsh for the following lands in N. M. P. M., New Mexico:

- T. 25 S., R. 26 E.,
  - sec. 24, SE $\frac{1}{4}$ .
  - sec. 25, E $\frac{1}{2}$ NE $\frac{1}{4}$ , NW $\frac{1}{4}$ NE $\frac{1}{4}$ , NE $\frac{1}{4}$ NW $\frac{1}{4}$ , SE $\frac{1}{4}$ .
- T. 25 S., R. 27 E.,
  - sec. 19, all.
  - sec. 20, S $\frac{1}{2}$ NW $\frac{1}{4}$ , SW $\frac{1}{4}$ , S $\frac{1}{2}$ SE $\frac{1}{4}$ .
  - sec. 29, N $\frac{1}{2}$ .
  - sec. 30, all.

On April 9, 1946, at 8:30 a. m., sodium permit applications for the above-described land were filed simultaneously by both Roy Forehand and R. R. Marsh. Forehand's application included some additional land, namely, the N $\frac{1}{2}$ N $\frac{1}{2}$  sec. 31, T. 25 S., R. 27 E. A public drawing was held by the register on April 16, 1946, at which Marsh's application drew No. 1 and Forehand's No. 2. Forehand protested against the issuance of a permit to Marsh, claiming a preference as the result of substantial expenditures made by him under prior permits.

The protest was dismissed by the Bureau of Land Management on the grounds that it was in accord with departmental regulations

to hold a drawing in the case; that equities ripen into preference rights only when the exploratory work results in a discovery of valuable deposits; that further prospecting work is here necessary to establish the presence of the deposits in workable quantity and quality; that Forehand was treated by the Government with utmost liberality in that a series of permits, beginning February 1938, were issued to him involving the same land; and that he has failed to submit evidence of any prospecting during the life of his last permit. Dismissing Forehand's protest, the Bureau granted him an election either to retain the  $N\frac{1}{2}N\frac{1}{2}$  sec. 31 not involved in the drawing, amend his application to embrace other lands, or withdraw his original application without prejudice.

In his appeal, Forehand asserts that the rules requiring awarding by lot were not intended to override his equities, and that, as shown by a lease application which he submitted under an earlier permit, two wells were drilled at his expense upon the land, one of which made a discovery of valuable mineral. He claims that that discovery was sufficient to entitle him to a lease but that the conditions set by the Commissioner for the lease, namely an investment of \$150,000, and a minimum production of \$20 per acre, were unreasonable and impossible to comply with during the war period because of lack of materials and labor. He alleges that he was, therefore, compelled to dismiss his lease application and, in lieu thereof, had to secure another permit in order to protect his investment in the property until the end of the war. Finally, he stresses that the life of his last permit fell within a period—the last year of the war and the first postwar year—during which materials and labor could not be secured.

Marsh has replied to the appeal. He claims that Forehand's discovery was of magnesium, not of sodium, and consequently no basis for a preference to a sodium lease or permit; that by declining to accept the tendered lease Forehand admitted the lack of minerals in commercial quantities or qualities; and that even now he does not aver the presence of commercially workable minerals. Marsh also contends that in any event Forehand is not entitled to any preference in his permit application and that granting a preference right to a new prospecting permit would defeat the very purpose of the statute and the regulations.

Section 23 of the Mineral Leasing Act of February 25, 1920, as amended (41 Stat. 437, 447; 30 U. S. C. sec. 261), authorizes the Secretary, "under such rules and regulations as he may prescribe," to grant prospecting permits for chlorides, sulphates, carbonates, borates, silicates, or nitrates of sodium for a period of not exceeding 2 years. And section 24 of the act (30 U. S. C. sec. 262) confers



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upon the permittee a preference right to a *lease*, upon showing to the satisfaction of the Secretary that valuable deposits of one of the enumerated substances have been discovered by the permittee and that the land is chiefly valuable therefor.<sup>1</sup> However, there is no statute providing for preference rights in the issuance of sodium prospecting *permits*. The only conceivably relevant reference to a preference right was in the first sentence of 43 CFR, Cum. Supp., 191.14, which reads as follows:

In case two or more applications are received in the same mail, or are presented at the counter by persons present at the land office at the same time for the purpose of filing their applications, or when one or more applications are received by the same mail and one or more are presented at the counter when the mail is received, which applications conflict in whole or in part, and in which no preference rights are claimed, the applications so received will be considered as filed simultaneously and the right of priority of filing will be determined by a public drawing in the manner provided by § 295.8. \* \* \*

These provisions, however, related to applications for leases as well as permits. And the reference to claiming a preference right was to the only such right given by either the statute or the regulations, to wit, in relation to leases earned by discovery while holding a permit.

The instant case involves the issuance of a permit, not a lease. Consequently, there is no requirement under the statute and no provision in the regulations on the basis of which Forehand could claim a preference based upon alleged equities. The Bureau's action in determining the priority by a public drawing was, therefore, correct and in accordance with law. This consideration alone disposes of the appeal and makes it unnecessary to examine the various issues presented by the parties on appeal. Nevertheless, it may be appropriate to discuss Forehand's claim to a preference because of equitable considerations.

After having been granted a sodium prospecting permit for the lands here involved in February 1938 (Las Cruces 054637), Forehand was issued another permit for the lands on June 7, 1940 (Las Cruces 057654). On April 25, 1942, he filed a preference-right lease application, alleging that he had drilled two wells which indicated that the lands contained magnesium. On the basis of a Geological Survey report that the brines of the wells contained sodium sulphate and other valuable elements, Forehand was offered a lease by the Land Office on October 23, 1942. When he objected to the terms of that lease, the

<sup>1</sup> The regulation issued pursuant to the statutory authority (43 Code of Federal Regulations 195.5) states explicitly that the preference right to a lease shall accrue "If the permittee *within the 2 years specified* shall discover valuable deposits of one or more of the forms of sodium as described in said Act within the area covered by his permit \* \* \* [Italics supplied.]

<sup>2</sup> Section 191.10, which was substituted for the above section 191.14 in the revision of Part 191 of 43 CFR, on October 28, 1946 (11 F. R. 12952), omits any reference to preference rights.

Land Office decision of October 12, 1943, afforded him an opportunity to submit evidence with a view toward reduction of the investment requirements. But in lieu of submitting such proof, he abandoned his lease application on October 30, 1943, and applied for a new permit, stating that he "believes further exploration should be done." Pursuant thereto, and in accordance with a redetermination by the Geological Survey that further prospecting would be necessary to determine the presence of sodium in the land in workable quantity and quality, a new permit was issued to him on April 8, 1944 (Las Cruces 062106). Also, in his current application for a prospecting permit he states that he "now believes he may be better able to do so" (i. e., to do prospecting work). And the latest report of the Geological Survey again emphasizes that further prospecting will be necessary to determine the presence of sodium in workable quantity and quality in the land. Thus, aside from the fact that Forehand's application is for a permit, not a lease, and cannot be construed as an alternative lease application, it follows that in any event he would not now qualify for a preference lease.<sup>3</sup>

The decision of the Bureau of Land Management is affirmed.

WARNER W. GARDNER,  
*Assistant Secretary.*

#### N. G. MORGAN ET AL.

A-24347

*Decided February 10, 1947*

#### Oil and Gas Leases—Preference Right Under Act of July 29, 1942.

An application for a preference-right oil and gas lease under the act of July 29, 1942 (56 Stat. 726), will be rejected where subsequent to the filing of the application the land involved has been withdrawn from oil and gas leasing. The preference right conferred by the act of July 29, 1942, does not give the holder a vested right to the issuance of a lease but merely a preference over others to a lease if a lease is issued.

#### APPEAL FROM THE GENERAL LAND OFFICE<sup>1</sup>

The 5-year term of noncompetitive oil and gas leases, Salt Lake City 033106, 025499, and 064846, expired on December 31, 1944. Prior to that date, on December 20, the respective lessees<sup>2</sup> filed timely appli-

<sup>3</sup> Moreover, according to the regulations (43 CFR 195.5) the discovery for which a preference lease is claimed must have been made within the 2-year period of the permit. See, *supra*, footnote 1. Admittedly, no discovery of any kind was made during the life of the last permit issued to Forehand (Las Cruces 062106).

<sup>1</sup> Effective July 16, 1946, the General Land Office and the Grazing Service were abolished and their functions were transferred to the Bureau of Land Management, by Reorganization Plan No. 3 of 1946 (11 F. R. 7875, 7876; 7776).

<sup>2</sup> N. G. Morgan held lease 033106; H. M. Robinson, J. C. Lynch, Russell K. Woodruff, and H. C. Goodman held lease 025499; and Dana Hogan and R. S. Shannon, lease 064846.

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cations for new leases under section 1 of the act of July 29, 1942 (56 Stat. 726; 30 U. S. C. sec. 226b). The applications bear the serial numbers Salt Lake City 064938 (Morgan), 064939 (Robinson *et al.*), and 064940 (Hogan and Shannon).

On April 5, 1946, the Commissioner of the General Land Office rejected the applications of Morgan and Hogan as to part of the lands applied for and the application of Robinson as to all, for the reason that the lands involved had been withdrawn from mineral leasing on January 4, 1945, by Public Land Order No. 256 (43 CFR, 1945 Supp., App.).<sup>3</sup> He stated in his decisions that none of the applicants had asserted any equities which would justify a modification of the withdrawal to permit the issuance of preference-right leases.

Morgan and Robinson have filed a joint appeal, Morgan purporting to act on behalf of Hogan. Whether he has been authorized to do so is not clearly shown, but since the same question affects all three leases, the point need not be raised here. Appellants' contention is that since they had filed timely applications for preference-right leases in accordance with the Department's regulations and the act of July 29, 1942, *supra*, and had met all the requisite conditions, new leases must be issued to them. The fact that at a subsequent date the lands were withdrawn did not, they allege, impair in any way the preference right acquired by them on January 1, 1945. They contend that their rights are vested, there being no similarity between a mere application for a lease and a preference-right application.

Appellants' contentions must be rejected. In the case of applications for noncompetitive leases filed under section 17 of the Mineral Leasing Act (41 Stat. 437, 443; 30 U. S. C. sec. 226), as amended, the Department has consistently rejected the applications where, subsequent to their filing, the lands applied for were withdrawn from leasing. *Elsie M. Grammer et al.*, A. 23730, December 31, 1943; *Carl H. Beal*, A. 23739, January 5, 1944; *Harold S. Anderson, Jr.*, A. 23795, May 10, 1944 (all unreported). Appellants apparently would not question the validity of this practice.

A preference-right applicant under the act of July 29, 1942, stands in no better position than a section 17 applicant in that respect. The 1942 act provides only that he "shall be entitled to a preference right over others to a new lease for the same land pursuant to the provisions of section 17" of the Mineral Leasing Act. This reads much like the provision in section 17 that the first applicant for a noncompetitive lease "shall be entitled to a preference right over others to a lease of such lands." Nowhere in the terms of the 1942 act or in its legislative

<sup>3</sup> The withdrawal embraces 40 of the 120 acres in Morgan's application; 280 of the 1,160 acres in Hogan's application; and all of the 2,381 acres in Robinson's application.

history is there any indication that a preference-right applicant shall be entitled to any more than is given him by the quoted language, namely, a right over others to receive a lease *if* a lease is issued. The Department has consistently held that the act confers upon him no vested right to the issuance of a lease. *Harry J. Lane, Admr. of the Estate of Mary A. Lane*, A. 24028, April 30, 1945 (unreported); *Charles S. Hill et al.*, 59 I. D. 215 (1946). Appellants' attempt to distinguish their rights from those of a section 17 applicant must therefore fail.

In answer to the Commissioner's statement that they had shown no equities which would justify a modification of the withdrawal to permit the issuance of leases, appellants make the bare statement that Robinson *et al.* drilled a test well on their lease at considerable expense. No details are given as to the time of drilling or the amount of expenses, or any other facts showing any substantial equities in the lessees. Appellants also assert that through Morgan's cooperation, a well was drilled on *adjoining* land which resulted in a discovery of potash and occasioned the withdrawal in question. How this gives Morgan any equities in the issuance of a new lease is not at all evident.

It is clear that the Commissioner's decisions were correct.<sup>4</sup> They are therefore affirmed.

C. GIRARD DAVIDSON,  
*Assistant Secretary.*

## STATE OF NEW MEXICO

A-24400

*Decided February 12, 1947*

### School Sections Within National Forests—Title of the State.

Title to school sections within national forests does not vest in the State of New Mexico until the lands are removed from the national forest (sec. 6 of the New Mexico Enabling Act of June 20, 1910, 36 Stat. 557, 562).

### School Sections—Title of the Territory—Title of the State.

The fact that title to school sections, previously surveyed, vested in the Territory at the time of the granting act of 1898 (30 Stat. 484) does not have the result that title necessarily passed to the State by operation of law, since section 6 of the New Mexico Enabling Act of June 20, 1910 (36 Stat. 557, 562), delayed the vesting of the State's title until the lands are removed from the national forest; also in cases where the lands had been included in the forest after having been surveyed.

<sup>4</sup>There is one error in the Commissioner's decision on Hogan's application. After reciting that the application covered lands in secs. 21, 22, and 28, T. 22 S., R. 19 E., S. 1. M., the Commissioner said that all the land, except that in sec. 28, was withdrawn by Order No. 256. Since sec. 21 is also not included in the withdrawal, the application should not have been rejected as to the land in that section. The affirmance of this decision is on the understanding that this error will be rectified.

February 12, 1947

APPEAL FROM THE GENERAL LAND OFFICE<sup>1</sup>

The State of New Mexico, by its Commissioner of Public Lands, has appealed from the ruling of the General Land Office dated June 18, 1946, which held that title to sections 16 and 36, T. 19 S., R. 12 E., N. M. P. M., had not vested in the State.

The plat of survey for the above sections was approved on March 18, 1886. By proclamation of April 24, 1907 (35 Stat. 2127), the sections were included in the Sacramento National Forest and have never been eliminated therefrom. Relying upon the second proviso of section 6 of the New Mexico Enabling Act of June 20, 1910 (36 Stat. 557, 562), the Land Office answered in the negative the State Commissioner's inquiry whether the title to the above sections had vested in the State.

In support of its conclusion that title to the sections vested in fee simple, the State contends on appeal that the school-section grant to the Territory of New Mexico in the act of June 21, 1898 (30 Stat. 484), was a grant *in praesenti*, and that the fee simple title, acquired by the Territory, "came to the State of New Mexico along with the territorial Capitol and other property, by operation of law." The State argues that the creation of the Sacramento National Forest could not legally interfere with the vested title of the Territory, and that it would not be reasonable to construe the land provisions of the New Mexico Enabling Act, *supra*, as divesting the State of the title. Indemnity selections for the sections here in question, the State contends, would not serve its purposes since the entire township 19, with small exceptions, is owned by the State, so that the land pattern in the area would be greatly disturbed by the exclusion of sections 16 and 36.

The present controversy is determined by the express provision of section 6 of the New Mexico Enabling Act of June 20, 1910, *supra*. The portion of that section which is here relevant reads as follows:

\* \* \* That the grants of sections two, sixteen, thirty-two, and thirty-six to said State, within national forests now existing or proclaimed, shall not vest the title to said sections in said State until the part of said national forests embracing any of said sections is restored to the public domain; but said granted sections shall be administered as a part of said forests, and at the close of each fiscal year there shall be paid by the Secretary of the Treasury to the State, as income for its common-school fund, such proportion of the gross proceeds of all the national forests within said State as the area of lands hereby granted to said State for school purposes which are situate within said forest reserves, whether surveyed or unsurveyed, and for which

<sup>1</sup> Effective July 16, 1946, the General Land Office and the Grazing Service were abolished and their functions were transferred to the Bureau of Land Management, by Reorganization Plan No. 3 of 1946 (11 F. R. 7875, 7876; 7776).

no indemnity has been selected, may bear to the total area of all the national forests within said State, the area of said sections when unsurveyed to be determined by the Secretary of the Interior, by protraction or otherwise, the amount necessary for such payments being appropriated and made available annually from any money in the Treasury not otherwise appropriated. [Italics supplied.]

The italicized language makes it clear that title to the sections in question does not vest in the State until the lands are removed from the national forest. In order to overcome the express provision of the statute, the State has cited numerous authorities designed to support its argument that fee simple title was acquired by the State and that such title was disturbed neither by the creation of the national forest nor by the New Mexico Enabling Act. None of the authorities serves to refute the result reached by the Land Office.

Thus, *United States v. King and Cowe*, 3 How. (44 U. S.) 773 (1845); *Wilcox v. Jackson*, 13 Pet. (38 U. S.) 498 (1839); and *Cooper v. Roberts*, 18 How. (59 U. S.) 173 (1855), are cited for the proposition that the grant of the sections by the 1898 act was a grant *in praesenti* so that, the lands having previously been surveyed, title vested in the Territory when the act was passed. But the issue here presented is not whether title passed to the *Territory*. In fact the Land Office, referring to the precedent of *Tillian et al. v. Keepers*, 44 L. D. 460 (1915), stated specifically that title to sections 16 and 36, surveyed prior to the act of June 21, 1898, did pass to the Territory at the date of that act unless the lands at that time were reserved or otherwise disposed of or were known to be mineral in character. *Cf. United States ex rel. State of New Mexico v. Ickes*, 72 F. (2d) 71 (1934), *cert. denied* 293 U. S. 596. Rather, the issue is whether title vested in the *State*.

Arguing from the acquisition of title by the Territory, the State quotes from Article 22, section 6, of the New Mexico constitution, and from the opinion in the case of *Brown v. Grant*, 116 U. S. 207 (1886), in order to sustain its contention that title passed to the State by operation of law. But the very quotation from the Supreme Court opinion, supplied in the brief of the State—"Unless otherwise declared by Congress, the title to every species of property owned by a Territory passes to the State upon its admission into the Union" (116 U. S. at p. 212; italics supplied)—shows that in the present case title did not pass to the State, for the above-quoted portion of section 6 of the New Mexico Enabling Act, *in haec verbis*, contains such a congressional declaration "to the contrary." And, of course, the provision of the New Mexico constitution that "All property, real and personal \* \* \* belonging to the Territory of New Mexico, shall become the property of this state" (Art. 22, sec. 6), was not intended to, and in

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any event could not, prevail over the express terms of the New Mexico Enabling Act.<sup>2</sup> The Presidential proclamation of January 6, 1912 (37 Stat. 1723), providing for the admission of the State of New Mexico, stated specifically that such proclamation was "in accordance with the provisions" of the New Mexico Enabling Act.

The State, citing *Wilcox v. Jackson*, 13 Pet. (38 U. S.) 498 (1839), and *Hibberd v. Slack*, 84 Fed. 571 (1897), contends that the vested title, acquired upon the survey of the land, could not be disturbed by the creation of the Sacramento National Forest and that therefore the reasonable meaning of the above-quoted proviso of section 6 of the Enabling Act could only be that sections 16 and 36 should not vest in the State if they had been included in a reservation prior to the identification by survey. It need not here be determined whether the inclusion within the forest had any effect on the title of the Territory,<sup>3</sup> for in any event section 6 of the Enabling Act should not be interpreted in the narrow manner suggested by the State. Section 6, in general language, delays the vesting of the State's title to lands "within national forests now existing or proclaimed." The statute specifically includes in this provision lands within said forest reserves, "whether surveyed or unsurveyed," and there is no indication whatever that that rule was to be limited to land surveyed after its inclusion in a forest reservation. Section 6, it should be noted, does not preclude the acquisition of title by the State, but merely delays it until restoration of the lands to the public domain. Moreover, it provides that the State be granted, as compensation for such delay, a proportionate share of the gross proceeds from all the national forests within the State. Special consideration was thus given to the interests of the State in the New Mexico Enabling Act, and this constitutes an additional reason why the provision should not be limited unjustifiably, in violation of the clear terms of the statute.

Finally, the State contends that the interpretation of the Enabling Act here adopted would "divest vested rights." But any rights which

<sup>2</sup> It may be noted that in the case of *Brown v. Grant*, *supra*, involving the identical provision of the Colorado constitution, the Supreme Court, after setting forth the above-quoted language, continued as follows: "The provision in the State constitution to that effect was only declaratory of what was the law," i. e., declaratory of the rule that title passes to the State, "unless otherwise declared by Congress."

<sup>3</sup> The case of *Hibberd v. Slack*, *supra*, held only that school lands title to which had vested in a State could not be made part of a forest reservation. Similarly, the dictum in *Wilcox v. Jackson*, *supra*, at p. 513, quoted by the State, that "whenever a tract of land shall have once been legally appropriated to any purpose, from that moment the land thus appropriated becomes severed from the mass of public lands; and \* \* \* no subsequent law, or proclamation, or sale, would be construed to embrace it, or to operate upon it," does not resolve the above-stated issue, namely the effect of a reservation upon the title of a Territory. Cf., generally, memorandum opinion, July 16, 1946 (M-33540), 59 I. D. 280, entitled, "Reclamation Withdrawal of Surveyed Arizona School Lands," which, citing authorities, explained that despite severance from the public domain by a forest reserve, lands remain subject to a reclamation withdrawal.

the *State* of New Mexico might have to the lands could only have been created by the Enabling Act. There cannot be any vested rights of a State prior to its admission to the Union.

The conclusion here reached is in accord with an earlier ruling of the Department. In a letter of January 15, 1929, to the State Commissioner of Public Lands, the Secretary took the same view concerning sections 16 and 36, T. 16 S., R. 13 E., N. M. P. M. The view also was sustained by a decision of the District Court of the United States for the District of New Mexico. In the unreported case of *United States v. Nelson A. Field* (decided August 8, 1921, No. 760, Equity), District Judge Neblett determined the status of certain school sections (section 16, T. 17 S., R. 12 E., portions of section 36, T. 17 S., R. 11 E., N. M. P. M., etc.) which, like the sections here involved, had been surveyed prior to inclusion in a forest reserve. He ruled that the State of New Mexico had no title to the lands.

The decision of the General Land Office is affirmed.

C. GIRARD DAVIDSON,  
*Assistant Secretary.*

### HORACE CRISP v. OMAR LeROY MAINE

A-24311

*Decided February 14, 1947*

#### Homestead Entry—Establishment of Residence—Residence Required for Final Proof—Contest Proceedings.

A charge of failure to establish residence is not sustained by evidence to the effect that the residence maintained was not of the character contemplated by the requirements of final proof.

#### Homestead Entry—Establishment of Residence—Good Faith of Entryman—Elements of Residence Required for Final Proof.

The good faith of the entryman is the basic essential in determining whether residence has been established (*Slette v. Hill*, 47 L. D. 108), and the rule laid down in that case is in no way dependent upon the establishment of the elements of residence required for final proof, such as a habitable house. Cf. 43 CFR 166.26.

#### Homestead Entry—Good Faith of Entryman—Establishment of Residence.

The determination whether an entryman has acted in good faith must be made in the light of all the circumstances of each particular case; and in this connection the amount of work done by the entryman on the homestead and his efforts to secure a well and to build a house are important.

#### Homestead Entry—Good Faith of Entryman in Establishing Residence—Primitive Conditions on Homestead—Possession of Shack Somewhere Else.

The fact that the entryman had a shack on some other place; that as compensation for his work there he was to obtain a certain portion of that



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tract; and that the conditions under which he and his family stayed on the homestead were very primitive, are matters which, standing alone, would tend to raise doubts as to the good faith of the entryman in establishing his residence on the homestead but, when weighed with due regard to all the circumstances of the case, they are insufficient to establish lack of good faith on the part of the entryman.

#### APPEAL FROM THE GENERAL LAND OFFICE<sup>1</sup>

This is an appeal from the decision of the General Land Office which canceled Omar LeRoy Maine's reclamation homestead entry, Blackfoot 054370, made under section 2289, Revised Statutes (43 U. S. C. sec. 161), and the act of June 17, 1902 (32 Stat. 388; 43 U. S. C. sec. 416).<sup>2</sup>

Maine made the entry on October 2, 1942, and on May 12, 1943, was granted an extension of time until October 2, 1943, to establish residence on the homestead. On July 12, 1944, Horace Crisp filed application No. 4112 to contest the entry, charging—

THAT SAID ENTRYMAN has never, at any time, established residence on said land & Entry; that said entryman has never improved the entry except to plow about 20 acres and crop 10 acres; that he resides about three miles from the entry farming another tract; that there is no house of any kind or other place of residence on the land; that his failure to establish his residence thereon has been for more than a year and a half last past; that the alleged abandonment is NOT DUE TO ANY MILITARY SERVICE whatsoever, as required by Par. "E", page 4, Ch. 1481, under Act of Oct. 17, 1940.

A hearing was held on October 17, 1944, and extensive testimony introduced by witnesses for both the contestant and the contestee. The register rendered a decision recommending dismissal of the contest. Setting forth in full the evidence submitted at the hearing, he reached the conclusion that, while the presence of the entryman and his family on the homestead was not residence to the exclusion of a home elsewhere as is required for making final proof, nevertheless, together with the acts of cultivation and irrigation and the attempts to secure water and to build a house, it gives ample evidence of good faith and shows that it was Maine's intention to begin his residence and to make the homestead his home. The Land Office, on the other hand, concluded that Maine never established his actual residence and personal domicile on the entry "as a permanent abode to the exclusion of a home elsewhere," and that the tiny shack which he maintained

<sup>1</sup> Effective July 16, 1946, the General Land Office and the Grazing Service were abolished and their functions were transferred to the Bureau of Land Management, by Reorganization Plan No. 3 of 1946 (11 F. R. 7875, 7876; 7776).

<sup>2</sup> Farm Unit B in the Boise project and the Black Canyon irrigation district, consisting of lots 1, 2, 3, sec. 2, T. 6 N., R. 5 W., SE $\frac{1}{4}$ SE $\frac{1}{4}$  sec. 35, T. 7 N., R. 5 W., B. M., Idaho, the equivalent of 176.16 acres.

on the entry was not his home but was "a place of convenience" to use when farming on the entry.

There is no real dispute between the parties as to the basic facts determining the question here at issue, but the parties sharply disagree as to the legal effect to be given to those facts.

It appears that in February 1941 Maine moved to the farm of R. Vance Wilkerson, which is situated approximately 3 miles from the homestead. Maine entered into a contract with Wilkerson under which he farmed about 45 acres of irrigable land. The contract, which was to expire in 1945, provided that as compensation for satisfactorily leveling the land and putting in laterals Maine was to get the north sixty of the land. The living accommodations of Maine and his very large family<sup>3</sup> on the Wilkerson place at first consisted merely of a tent house. After 1 year he made a one-room board structure out of it and added a lean-to bedroom. Maine did the construction work, the material being 2 by 4 rough boards, tar paper, and laths. However, it was testified at the hearing, and not disputed, that for a period of over 2 years before the hearing, i. e., since sometime in 1942, Maine did not make any improvements on the house.

Evidence submitted at the hearing shows that Maine cleared 20 acres of brush on the homestead entry and began some other clearing. He also dug all ditches necessary to irrigate those 20 acres. The value of his work in that respect was stated to have amounted to \$700-\$1,000. In 1943, Maine planted about 10 acres of beans and 3 acres of sugar beets on the homestead. He estimates that he planted 14 acres of sugar beets, 4 acres of bulb onions, a half acre of potatoes, and a quarter acre of strawberries in 1944.

Beginning in April 1943, Maine, his wife and some of the younger children, stayed on the homestead during nights, not every night, but "a good many nights." In 1943 there was no shack on the homestead. Maine took a bed roll along in his truck, and some members of the family slept on the bedding on the ground, and others in the truck. They cooked over a campfire or an old stove. Testimony showed that "once or twice" in the spring of 1943 and the spring of 1944 a relative visited them at their homestead late in the evening, and that he ate the evening meal with them on the homestead.

Maine testified under oath that approximately 2 months after making his entry he made efforts to buy a built-up shack to move onto the homestead, but because of war conditions did not succeed. He then attempted to buy lumber, new or old, to build a house for the whole family to live in, but again was unsuccessful. Emil A. Stunz, a retail

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<sup>3</sup> At the time of the contest hearing he had 10 children ranging in age from 18 years to a few months.

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lumberman, testified, also under oath, that in the fall of 1943 Maine contacted him and discussed with him the building of a house on the homestead, laying out a general plan for the house, its dimensions, size, and construction. Stunz testified that Maine then decided on a basement house, 28 by 30, or 32, sufficient for four or five rooms. In February or March of 1944, Stunz, together with Maine, made out an estimate of the cost of the house, but he has testified that at no one time since he first talked with Maine about the house was he able to furnish all the material needed. Shortly after Christmas 1943, Mr. and Mrs. Maine made an arrangement with a farmer in the neighborhood, Sam Henne, that, as compensation for some work they would do for him on his farm, he would assist them in building a house on the homestead. Sometime thereafter Maine did some work for Henne, for which Henne was to assist Maine in the construction of the house. On May 11 or 12, 1944, when Maine worked for Henne, he indicated that in about a month or two he wanted Henne to help him in putting in forms for the basement house.

Also, in the latter part of 1943, Maine made a contract with a Mr. Orchard, a well driller in the neighborhood, for drilling a well on the homestead. However, when he heard that Mr. Orchard had been unsuccessful in his efforts to drill other wells, Maine canceled the arrangement. Mr. Orchard informed Maine that he could not in any event have drilled a well for him before July 1944. Thereupon, towards the end of April or early in May 1944, Maine arranged with a Mr. Albert Witt, of Boise, Idaho, to have a well drilled. Witt told Maine that because of other arrangements he could not do the work before the latter part of May or the first part of June. Witt took ill and did not return to the vicinity until shortly after the 4th of July, when he began drilling a well for a neighbor of Maine under an earlier contract. Maine testified that he had made arrangements for a Federal loan to cover the cost of drilling, but that in view of the contest filed by Crisp in the meantime the Federal agency canceled the arrangement. He also testified that he possessed no funds of his own to pay for the drilling expenses, since he had no money but merely lived from what he earned from day to day by working for various farmers and from the crops which he secured by his own farming.

On June 14, 1944, Maine purchased the following quantity of lumber from Stunz:

9 pieces, 1 by 12 by 12.	1 piece, 2 by 6 by 10.
18 pieces, 1 by 12 by 16.	2 bundles, lath.
7 pieces, 2 by 4 by 16.	18 pounds, nails.
10 pieces, 2 by 4 by 10.	1 pair of 6-inch strapping.

Stunz delivered the lumber at his yard to Maine's truck, and the evidence shows that the material was taken by Maine to the homestead.

Witnesses have testified that they saw a pile of such material sufficient to build a homestead shack on the homestead land.

On July 8, 1944, i. e., before the filing of the contest, Maine started the building of a house on the homestead land. The building, as completed at the time of the contest hearing, was a shack, constructed in the same manner as that on the Wilkerson place, only a little smaller. The testimony shows that there is a serviceable stove in the structure and also a mattress, and that the shack is big enough for a bed.

It has been demonstrated that it was extremely difficult during 1943 and 1944 to secure the services of a well driller in the area. One neighbor testified that in order to find a well driller he traveled through the entire neighborhood of Boise but without success, and only in Ontario, Oregon, could secure the services of a well driller; and that he was unable to purchase a casing but managed to secure a casing left over from another well and merely in that way managed to obtain a well ahead of his neighbors. Another neighbor who purchased his land in November 1943 testified that he found it impossible to have a well drilled before July 1944.

Finally, the evidence developed at the hearing makes it clear that, because of the isolation of the homestead, its lack of springs or bodies of water, it is impossible for a family of the size of Maine's to live on the homestead permanently without obtaining a domestic water supply.

It is settled that a charge of failure to establish residence and abandonment is not sustained by evidence to the effect that the residence maintained was not of the character contemplated by the requirements of final proof. *Slette v. Hill*, 47 L. D. 108 (1919); *Kesler v. Judge*, 48 L. D. 297, 300 (1921). In the *Slette* case, the periods of residence of the entryman on the homestead were only "brief and intermittent"; the time within which to establish residence had expired on May 16, 1916; the entryman had gone onto the land on May 13 but stayed only 3 days; his next stay was for a week or 10 days in June; he was on the land 4 days in July, 3 days in August, 1 day in September, 4 days in October (his wife remained 5 days), 2 days in November (his wife was there 7 days), and 2 days in December. The Department held that those facts, together with the improvements made by the entryman, were sufficient to indicate that the entryman had not abandoned the land but had established residence, and dismissed the contest.

The present case is essentially similar to the case of *Slette v. Hill*. As in that case, Maine's residence on the land was brief and intermittent; and in both cases, sufficient of the lifetime of the entry remained at the filing of the contest within which the requirements of the law as to residence could be met. True, there was a house on

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the homestead in the case of *Slette v. Hill*, but the rule laid down in that case is in no way dependent upon the establishment of the elements of residence required for final proof (*cf.* 43 Code of Federal Regulations 166.26, requiring a habitable house at the time of final proof); the basic essential is the good faith of the entryman.

A charge of abandonment is not sustained by evidence to the effect that the residence maintained was not of the character contemplated by section 2291, Revised Statutes, as amended by the act of June 6, 1912 (37 Stat., 123), provided sufficient of the lifetime of the entry remains within which to meet the requirements of the law as to residence, *unless it is made to appear that the entryman has not acted in good faith.* [47 L. D., at p. 109; italics supplied.]

The contestant in this case has failed to show lack of good faith on the part of Maine. The determination whether an entryman has acted in good faith, of course, must be made in the light of all the circumstances of each particular case. The amount of work done by the entryman on the homestead and his efforts to secure a well and to build a house are important. Maine and his wife did substantial work on the homestead, clearing and leveling the land, making ditches, irrigating, and raising crops. It is also indicated that at the expiration of the time permitted for establishing residence, Maine was making serious efforts to have a well drilled on the land and to build a house. It is true that he did not succeed in securing a well and that he obtained lumber and began the construction of a shack on the homestead only after the expiration of the prescribed time limit, though *before* the filing of the contest. But his efforts must be appraised against a background of common knowledge that during the war years it was extremely difficult to obtain the necessary material and services to drill a well or to secure the lumber required for construction of a house. And the fact that Maine purchased building material for the homestead and began construction of a building, though only after the prescribed time limit, is a factor which, together with the other evidence, shows that Maine cannot fairly be charged with bad faith.

True, Maine had a shack on the Wilkerson place; as compensation for his work there he was to obtain the north sixty of that tract; and the conditions under which he and his family stayed on the homestead were very primitive. Those are, of course, matters which, standing alone, would tend to raise doubts as to the good faith of the entryman in establishing his residence on the homestead. However, when weighed with due regard to all the circumstances of the case, they are insufficient to establish lack of good faith on the part of the entryman. The evidence shows that the shack on the Wilkerson place is only slightly larger than that constructed by the entryman on the homestead and is also clearly inadequate for a family of 12;

moreover, a tract of 60 acres obviously is not sufficient for sustaining such a large family, whereas it should be noted that the homestead entry amounts to over 176 acres. Especially, it seems significant that no improvements were made by Maine on his shack on the Wilkerson place since making his homestead entry, while he incurred comparatively substantial expenditures in connection with his homestead land. And the fact that Maine and his family camped on the homestead under primitive conditions cannot be viewed as an isolated matter but must be regarded in the light of the economic status of the entryman. When thus considered, it does not serve to disprove the good faith of the entryman otherwise demonstrated.<sup>4</sup>

The contestant has not made the showing necessary for canceling the entry. The decision of the General Land Office is reversed and the contest dismissed.

OSCAR L. CHAPMAN,  
*Under Secretary.*

**BANK OF AMERICA,  
NATIONAL TRUST AND SAVINGS ASSOCIATION.  
EXECUTOR OF THE ESTATE OF WILLIAM B. BEAIZLEY**

A-24427

*Decided February 14, 1947*

**Mineral Leasing Act—Preference-Right Oil and Gas Lease Application.**

Where a preference-right oil and gas lease applicant, who was a citizen of the United States, died while his application was pending, leaving as heirs only nonresident aliens who assented to an assignment by the decedent's American-executor of all their interests in the lease and application to a Delaware corporation, a request that the lease be issued to the estate of the decedent and that the assignment to the Delaware corporation be concurrently approved was properly rejected.

**Public Lands—Aliens.**

It is the general policy of the laws relating to the disposition of public lands and interests therein that aliens shall not be favored with participation in the bounty thus to be obtained from the United States.

**Public Lands—Right to Lease—Assignability.**

Neither the Mineral Leasing Act nor the regulations pertaining thereto make provision for the assignment of a mere right to receive a lease.

**Mineral Leasing Act—Preference-Right Oil and Gas Lease Application.**

One who has a preference right to the issuance of an oil and gas lease does not have a leasehold interest or a right to receive a lease, but merely a right to have his timely application preferred over others in the event that

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<sup>4</sup> *Of.*, generally, *Renshaw v. Holcomb*, 27 L. D. 131 (1898); *Kenfield v. Maginnis*, 35 L. D. 285, 291 (1906); *Higgins v. Wells*, 3 L. D. 21 (1884).

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the United States determines upon a further leasing of the same oil and gas lands at that time. Such a preference right is subject to be defeated by the occurrence of any event which might operate to make the lands unavailable for such further leasing or which might render the applicant incompetent to receive the lease.

#### APPEAL FROM THE BUREAU OF LAND MANAGEMENT

William B. Beazley filed an application for a preference-right oil and gas lease under the provisions of section 1 of the act of July 29, 1942 (56 Stat. 726; 30 U. S. C. sec. 226b). Before any action was taken on the application, Beazley died. All his heirs-at-law are nonresident aliens. The executor of Beazley's estate, with the consent of the appropriate probate court and the heirs, purported to make a total assignment of all interests of the estate in the lease to the Seaboard Oil Company of Delaware. The executor then requested the Bureau of Land Management to issue the lease to the estate of the decedent and concurrently to approve the assignment to the domestic corporation.

The Bureau of Land Management rejected the request for approval of the assignment on the grounds that there is no such property right in a lease application as can pass by descent and that section 1 of the Mineral Leasing Act (41 Stat. 437, as amended; 30 U. S. C. sec. 181) prohibits the disposition of oil and gas deposits and lands containing such deposits to individuals who are not citizens of the United States. The Bureau further referred to a departmental regulation then in effect against the assignment of mere rights to receive a lease (43 Code of Federal Regulations, Cum. Supp., 192.41). The assignment, accordingly, was held to be ineffective.

The executor of the estate has appealed, arguing that had Beazley died after issuance of the lease, the lease would have descended to his heirs; that his estate ought not to be penalized by reason of the fact that the lease was not promptly issued upon receipt of the application. It further states that the estate of a deceased citizen is qualified to own and hold an oil and gas lease and to make disposition thereof in the course of its normal distribution of the estate's assets. At any rate, the appellant urges, if the assignment is approved concurrently with the issuance of the lease, these alien heirs will have no further interest in the matter.

The decision of the Bureau discusses the rights of the heirs to obtain the lease for which Beazley applied, and concludes, in effect, that the lease may not issue to them. Nevertheless, the formal ruling of the Bureau relates only to the approval of the assignment and does not reject the lease application. However, the record in this proceeding is complete, the appellant has furnished the Department with

its argument concerning its right to the issuance of a lease, and there appears to be no good reason why both the basic question of the issuance of a lease to the alien heirs or the estate and the issue with respect to approval of the assignment should not now be resolved. (See Rules of Practice, 43 CFR 221.83.)

It is the general policy of the laws relating to the disposition of public lands and interests therein that aliens shall not be favored with participation in the bounty thus to be obtained from the United States. This pervading policy is to be found, for example, in the homestead laws (Rev. Stat. sec. 2289; 26 Stat. 1097; 43 U. S. C. sec. 161), the timber and stone laws (20 Stat. 89; 27 Stat. 348; 43 U. S. C. sec. 311), the desert-land laws (19 Stat. 377; 26 Stat. 1096; 43 U. S. C. sec. 321), the laws pertaining to underground water reclamation grants (41 Stat. 293; 43 U. S. C. sec. 351), the Taylor Grazing Act as it relates to the grazing of stock in grazing districts (48 Stat. 1270; 43 U. S. C. sec. 315b), and the mining laws (Rev. Stat. sec. 2319; 30 U. S. C. sec. 22). It finds expression also in section 1 of the Mineral Leasing Act, *supra*, which, among other things, limits the disposition of deposits of oil and gas and lands containing such deposits owned by the United States "to citizens of the United States, or to associations of such citizens, or to any corporation organized under the laws of the United States, or of any State or Territory thereof \* \* \*."

The prime issue then is whether a lease may be granted under the arrangement effectuated between the executor of the estate, the alien heirs of Beazley, and the Seaboard Oil Company.

With the expiration of his original lease, Beazley's rights to the lands and minerals involved were terminated. At the time of his death, he held a preference right to the issuance of a new lease of the same lands; it was not a leasehold interest or a right to receive a lease, but merely a right to have his timely application preferred over others in the event that the United States determined upon a further leasing of the same oil and gas lands at that time. *Harry J. Lane*, A. 24028, April 30, 1945 (unreported). And the preference right was subject to be defeated by the occurrence of any event which might operate to make the lands unavailable for such further leasing (*Lucy H. Campbell*, A. 24313, June 18, 1946, unreported), or which might have rendered Beazley incompetent to receive the lease. Thus, as of the time of his death, Beazley had only the right to have his application considered prior to the consideration of any conflicting applications filed by others. Consequently, at the time of his death, Beazley had no rights to pass to his heirs save the right of first consideration of his application, a right quite different from a right to receive a lease.



*February 17, 1947*

Assuming that this limited right of first consideration might pass by descent to the heirs of Beazley, it is clear that upon such consideration the lease may not issue to them since they suffer the incompetency of alienage. Nor may the lease issue to the executor of the estate for the benefit of the alien heirs, for this in substance would amount to a violation of the statute. Likewise, the lease may not be issued to the purported assignee of the lease application since neither the Mineral Leasing Act nor the regulations pertaining thereto make provision for the assignment of a mere right to receive a lease.

The decision of the Bureau of Land Management is affirmed, and the lease application is rejected.

C. GIRARD DAVIDSON,  
*Assistant Secretary.*

**ALEXANDER P. MADISON v. DELBERT R. BASART**

**A-23691**

*Decided February 17, 1947*

**Public Lands—Accretion—Riparian Ownership—Patent.**

Where, prior to the entry and patent of a lot of public land abutting on a meander line, a substantial accretion had formed between the meander line of the lot and the actual shore line of the Missouri River, title to the added area did not pass under a patent for the surveyed upland.

**Public Lands—Accretion—Riparian Ownership.**

Under the law of North Dakota, where the State owns the land in the bed of a navigable river, the ownership of land in North Dakota, which has accreted from the bed to the banks of the river, becomes vested in the owner of the riparian lands.

**Patent—Interpretation in Accordance with Federal or State Law.**

The question as to whether a patent conveys land between a platted traverse line and the waters of a navigable stream, being a Federal question and governed by Federal law, is not required, by the decision of *Erie Railroad Co. v. Tompkins*, 304 U. S. 64 (1938), to be decided solely on the basis of State law. This case is, therefore, not governed solely by the North Dakota decision in *Oberly v. Carpenter*, 67 N. Dak. 495, 274 N. W. 509 (1937).

**Public Lands—Accretion—Riparian Ownership—Survey.**

Generally, a meander line along a bank or shore is not a line of boundary, the boundary line being the water line itself. There are, however, exceptions to this general rule. Thus, the meander line is held to be the true boundary line if the meander line was run where no lake or stream calling for it exists; or where it is established so far from the actual shore line as to indicate fraud or mistake; or if, at the time a homestead entry is made, a large body of land previously formed by accretion is existing between the meander line and the water of the stream. In such cases, the patent will be construed to convey only the lands within the meander line.

**Public Lands—Accretion—Riparian Ownership—Division of Alluvium.**

The general rule for establishment of side lines to divide alluvium between adjoining riparian owners along a river is to give each proprietor such proportion of the new shore line as he had of the old shore line. This is appropriately accomplished by measuring the whole ancient line of the river affecting the area involved and computing the portion of that line owned by each riparian proprietor; then measuring the whole length of the new shore line and appropriating to each proprietor such portion of the new line as he had of the old line; and then drawing the side lines from the points at which the proprietors bounded on the old line to the points of division thus determined on the new line. Such accretion side lines do not generally run cardinal to the survey lines. This rule is followed in North Dakota.

**Homestead—Secretary's Duty to Protect Entryman.**

Where a State court decision beclouds the title of the Federal Government to lands entered by a homestead entryman, the Department is under an obligation to its homestead entryman to protect his entry by appropriate action.

**Public Lands—Effect of State Decisions.**

The United States cannot be deprived of its title to public lands by a decision of a State court, particularly where the United States is not a party to the suit in the State court.

**Homestead—Suspension of Entry Pending Segregative Survey.**

Where the land within the record position of a homestead entry is partially submerged, partially owned by accretion to private riparian lands, and its title partially beclouded by the invalid claim of another alleged riparian owner, the entry will be suspended pending a segregative survey and the quieting of title to the Government's lands.

**Homestead—Survey and Resurvey—Effect on Patent.**

Where a homestead entry is made on the basis of a patented survey plat, the redesignation of the land in a subsequent survey plat, approved between the date of the entry and the date of the patent, will not necessarily control in the interpretation of the patent; and the patent, where governed by the plat of earlier survey, is subject to reformation. (Secretary's Instructions, M-33711, June 20, 1946.)

**Departmental Decisions Overruled to the Extent of Conflict with This Decision.**

*Harvey M. La Follette*, 26 L. D. 453 (1898); *John J. Serry*, 27 L. D. 330 (1898); *Gleason v. Pent*, 14 L. D. 375 (1892); *Lewis W. Pierce*, 18 L. D. 328 (1894).

**Decision Criticized and Not Followed.**

*Oberly v. Carpenter*, 67 N. Dak. 495, 274 N. W. 509 (1937).

**Decision Distinguished.**

*Jefferis v. East Omaha Land Co.*, 134 U. S. 178 (1890).

*February 17, 1947***MOTION FOR REHEARING**

On October 9, 1933, Delbert R. Basart's homestead entry (Bismarck 024312) under section 2289, Revised Statutes; 43 U. S. C. sec. 161, was allowed for the following lands:

T. 137 N., R. 79 W., 5th P. M., North Dakota,  
sec. 19, lots 6 and 7.  
sec. 30, lot 1 and NE $\frac{1}{4}$ NW $\frac{1}{4}$ .

On August 31, 1936, Joseph Keller, as guardian of Alexander P. Madison, a minor, filed a protest against Basart's entry.<sup>1</sup> This protest stated that Madison owns lot 4, sec. 19; that the lands here involved, lying in Burleigh County north of the Missouri River, had been built up by accretion to Madison's lands; that the lands described in Basart's entry formerly were in Morton County south of the Missouri River and had been washed away; and claimed that the lands in Basart's entry are now owned by Madison by virtue of accretion to his land. In view of this protest, the General Land Office,<sup>2</sup> on October 20, 1936, suspended action on Basart's application, pending investigation. Intensive field investigations were thereupon made, and the respective parties were accorded full opportunity to present any facts or arguments on the questions involved.

On June 12, 1943, the General Land Office, taking the view that the title of the United States to the lands in Basart's entry had been extinguished by erosion caused by the Missouri River and that the lands in Basart's entry are actually owned by those owning lots 4, 5, and 2, sec. 19, ordered the cancellation of Basart's entry. Basart appealed.

On October 9, 1943 (A-23691), the Department affirmed the decision of the General Land Office, and on November 22, 1943, denied Basart's motion for rehearing; but before the decision became final, the Department, by decision of January 5, 1944, withdrew its decision denying Basart's motion for rehearing and suspended action on the case, pending further investigations in the field to secure complete information concerning the lands involved. These investigations have now been completed, and the Department can now rule on Basart's motion for rehearing with full knowledge of the applicable facts.

The extensive meanderings of the Missouri River in the area here involved constitute the underlying basis of this case. In many

<sup>1</sup> Alexander P. Madison, having become of age, renewed the protest in his letter of September 10, 1946.

<sup>2</sup> Effective July 16, 1946, the General Land Office and the Grazing Service were abolished and their functions were transferred to the Bureau of Land Management, by Reorganization Plan No. 3 of 1946 (11 F. R. 7875, 7876; 7776).

places, the river meandered more than a mile from its positions shown on the 1888 and 1899 plats of survey. There appears to be no question that the movement of the river in this area, although rapid, was entirely by erosion on one side and accretion on the other; and there is no evidence, nor any contention apparently, of avulsive change in the course of the river. The investigation reports fully substantiate these facts. Attached are sketches\* of the 1888 and 1899 plats of survey of the area here involved and a sketch\* of the 1899 plat, on which are also shown the approximate positions of the Missouri River in 1905 and 1938,<sup>3</sup> the tracts and entries relevant to this case, and the approximate side lines of the accreted lands here involved. The investigation reports indicate that the present position of the Missouri River is approximately the same as its 1938 position.

There have been two surveys of the lands here involved, the first in 1888, and a resurvey in 1899. Some of the land was patented on the basis of the 1888 plat.<sup>4</sup> The 1899 survey shows that during the 11 years since 1888 the Missouri River had moved a considerable distance to the north through sec. 19. The lands in sec. 19 were almost en-

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\*These sketches are not printed, but they are part of the case file and are open to inspection. [Editor.]

<sup>3</sup> The 1905 position of the river was shown on the Geological Survey's 1905 topographic survey of the North Dakota Bismarck Quadrangle; and the 1938 position of the river was shown on aerial photographs made by the Agricultural Adjustment Administration.

<sup>4</sup> The  $W\frac{1}{2}NE\frac{1}{4}$  and the  $E\frac{1}{2}NW\frac{1}{4}$  sec. 19 were patented on August 10, 1895. By 1899, the Missouri River had begun to erode these lands. What remained of the  $W\frac{1}{2}NE\frac{1}{4}$  was redesignated on the 1899 plat as lot 2; what remained of the  $E\frac{1}{2}NW\frac{1}{4}$  was redesignated on the 1899 plat as lot 5 and  $NE\frac{1}{4}NW\frac{1}{4}$ . The only other tract in this section affected by the 1888 plat was that included in the patent on Final Certificate, Bismarck 5428, which was issued to Elliot C. Barnes on October 1, 1903, for, among other lands, lot 1, sec. 19. (Vol. 156, North Dakota Homestead Patent Records (Mineral), Recorder, General Land Office, p. 11.) Barnes made his homestead entry in 1895 on the basis of the 1888 plat of survey. When he offered final proof in 1902, sec. 19 had been resurveyed by the plat of December 20, 1899. Lot 1, sec. 19, of the 1888 plat of survey was redesignated on the 1899 survey plat as lot 3, sec. 19; and the  $NE\frac{1}{4}NE\frac{1}{4}$  on the 1888 plat was redesignated as lot 1, sec. 19, on the 1899 plat. As the result of some minor acreage changes resulting from the resurvey, the patent was issued to Barnes for 162.74 acres, which is the acreage shown on the 1899 plat for the lands described in Barnes' homestead application and patent. But it was apparently overlooked that the description in the patent should have been changed from lot 1, sec. 19, to lot 3, sec. 19, in order to conform the patent with the application. It seems clear that Barnes had intended to acquire, and the United States had intended to patent, that parcel of land shown as lot 1, sec. 19, on the 1888 plat and as lot 3, sec. 19, on the 1899 plat, and that his patent is, therefore, subject to reformation. See Acting Secretary Chapman's Instructions of June 20, 1946 (M-33711); *Williams v. United States*, 138 U. S. 514 (1891). Lot 1, sec. 19 (1899 plat), is now embraced in the homestead entry, Bismarck 024305, of Walter Woodworth. Since lot 3 (1899 plat) was never on the banks of the Missouri River, it clearly never had riparian rights. And it is unnecessary at this time to decide whether the title to lot 1 (1899 plat), which was completely eroded but later completely restored by the erosive-accretive action of the river, is in the United States or in the owners of the remote nonriparian lands which for a time were shorelands. Cf. *Towl v. Kelly and Blankenship*, 54 I. D. 455, 458-462 (1934), and cases cited; *Rex Baker*, 58 I. D. 242 (1942); *Clark*, "A Treatise on the Law of Surveying and Boundaries," sec. 252, pp. 274-284 (2d ed., 1939); *Wiltse v. Bolton*, 132 Nebr. 354, 272 N. W. 197 (1937); *Oklahoma v. Texas*, 261 U. S. 345, 346 (1923).

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tirely redesignated on the 1899 plat, as can be seen by a comparison of the sketches of the 1888 and 1899 plats of survey. As of 1899, the only privately owned lands in sec. 19 on the banks of the Missouri River were lots 2 and 5, all the other riparian land in sec. 19 being public lands. All the land on the banks of the Missouri River in sec. 30 of this township (T. 137 N., R. 79 W., 5th P. M.) and in secs. 24 and 25 of the adjacent township to the west (T. 137 N., R. 80 W., 5th P. M.) were public lands in 1899, except that lot 5 in sec. 24 was then in the homestead entry of one Mary E. Hapel.

The Missouri River reached its most northern position in the area here involved about 1905. Thereafter, it began to move to the south, eroding the right (southern) bank and building up the left (northern) bank. At present the river is entirely out of sec. 24, R. 80 W., and largely out of sec. 19, R. 79 W.; the 1899 river channel is firm ground. Whereas in 1899, lots 6, 7, 8, and 9, sec. 19, and lot 1 and NE $\frac{1}{4}$ NW $\frac{1}{4}$  sec. 30, were in Morton County, on the south bank of the river; the present record position of lot 6, sec. 19, is in Burleigh County, north of the river; the present record positions of parts of lots 7 and 8, sec. 19, and lot 1, sec. 30, are submerged, and the remaining parts thereof are north of the river, in Burleigh County; and the present record positions of lot 9, sec. 19, and NE $\frac{1}{4}$ NW $\frac{1}{4}$  sec. 30, are almost completely submerged.

Lot 4, sec. 19, was homesteaded by Alexander Madison's father, Ernest Madison, on May 14, 1927, after his application for second entry had been allowed under the act of September 5, 1914 (38 Stat. 712; 43 U. S. C. sec. 182). After Ernest Madison's death, Keller made final proof on behalf of Alexander P. Madison, then a minor, and Patent 1064637 (Bismarck 023131) was issued on June 6, 1933, to Alexander P. Madison for "lot 4, sec. 19, T. 137 N., R. 79 W., 5th P. M., containing 34.98 acres." The field investigations clearly show that both at the time of entry and at the time of patent, lot 4, sec. 19, was more than a half mile away from the banks of the Missouri River.<sup>5</sup>

As of 1899, the lands in sec. 19 lying on the north bank of the Missouri River had the following status: Lots 2 and 5 were in private ownership; lots 1 and 4 belonged to the United States. There is no dispute that as of May 13, 1927, the day before the allowance of

<sup>5</sup> Ernest Madison's relinquished homestead entry, Bismarck 018151, covered the N $\frac{1}{2}$ NE $\frac{1}{4}$ , NE $\frac{1}{4}$ NW $\frac{1}{4}$  and lot 1, sec. 30, T. 137 N., R. 79 W., 5th P. M. Of these lands, the NE $\frac{1}{4}$ NW $\frac{1}{4}$  and lot 1 are now covered by Basart's entry. Ernest Madison's application for second entry states that he relinquished his first homestead entry because "the river had cut the land away. \* \* \* the land was washed away. \* \* \* All of the land was cut away by the river and it was impossible to reside upon it." These contemporary statements corroborate the Department's finding and indicate that the entryman knew, at the time of his entry on lot 4, sec. 19, that the river was far from the record position of lot 4.

Ernest Madison's entry, the United States, as the owner of lot 4, sec. 19, owned all the land which had accreted to that lot 4.<sup>6</sup> The question in this case therefore is whether Madison, under his patent issued in 1933 for "lot 4" "containing 34.98 acres," whose record position on the applicable survey plat was more than a half mile from the banks of the river, pursuant to his homestead entry in 1927, may validly claim the substantial accretion to that tract which had formed prior to May 14, 1927.

Before a determination can be made as to whether this accreted land passed with the patent to lot 4, sec. 19, there must be consideration of whether the question here involved is governed entirely by the law of the State wherein the land lies. If the law of the State of North Dakota controls this case, all of the lands in Basart's homestead entry must be held to have passed into private ownership under the decision of the Supreme Court of North Dakota in *Oberly v. Carpenter*, 67 N. Dak. 495, 274 N. W. 509 (1937).

It has long been well settled that although the effect of a conveyance of riparian rights, if established, was decided by State law, the question of whether the original patent conveyed land between a platted traverse line and the waters of a navigable stream was a Federal question;<sup>7</sup> and that State laws could not affect titles vested in the United States.<sup>8</sup> It has been intimated in this proceeding, however, that this case must be governed by State law because of the decision of the Supreme Court in *Erie Railroad Co. v. Tompkins*, 304 U. S. 64 (1938). That case, a suit based on diversity of citizenship, held that "Except in matters governed by the Federal Constitution or by Acts of Congress, the law to be applied in any case is the law of the State," not a different "federal general common law." (304 U. S. 64, 78.) It would seem plain that the present case is not within the ambit of the *Erie* decision. But even if there could be any room for debate as to the scope of the *Erie* decision, more recent decisions of the Supreme Court of the United States indicate that *Erie Railroad Co. v. Tomp-*

<sup>6</sup> If the Missouri River is navigable, the State of North Dakota may have had an interest in the land in the bed of the river. *United States v. Utah*, 283 U. S. 64, 75 (1931). This interest of the State was subject, of course, to various paramount interests of the Federal Government not here material. *United States v. Appalachian Power Co.*, 311 U. S. 377, 405 (1940). Regardless of whether or not ownership of the land in the bed of the river was in the State, under the law of the State of North Dakota the ownership of the land which has accreted from the bed to the banks of the river becomes vested in the owner of the riparian lands. *North Dakota Revised Code of 1943*, sec. 47-0605; *Gardner v. Green*, 67 N. Dak. 268, 271 N. W. 775, 780 (1937); *Oberly v. Carpenter*, 67 N. Dak. 495, 274 N. W. 509 (1937); *Hardin v. Jordan*, 140 U. S. 371 (1891).

<sup>7</sup> *Producers Oil Co. v. Hanzen*, 238 U. S. 325, 338 (1915); *Brewer Oil Co. v. United States*, 260 U. S. 77, 87 (1922); *French-Glenn Live Stock Co. v. Springer*, 185 U. S. 47, 54 (1902); see, also, *Chapman & Dewey Lumber Co. v. St. Francis Levee Dist.*, 232 U. S. 186, 196 (1914); *Shively v. Bowlby*, 152 U. S. 1, 9-10 (1894).

<sup>8</sup> *United States v. Utah*, 283 U. S. 64, 75 (1931).

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*kins* does not require this case to be decided solely on the basis of State law.

In *United States v. Allegheny County*, 322 U. S. 174, 183 (1944), the Supreme Court stated:

\* \* \* The validity and construction of contracts through which the United States is exercising its constitutional functions, their consequences on the rights and obligations of the parties, the titles or liens which they create or permit, all present questions of federal law not controlled by the law of any State. \* \* \*

In holding and disposing of lot 4, a part of the public domain, the United States was exercising one of its constitutional functions.<sup>9</sup> The authority to issue the patent "had its origin in the Constitution and the statutes of the United States and was in no way dependent on the laws of" the State of North Dakota.<sup>10</sup> And in a controversy as to the effect of such patent in disposition of property of the United States, "in the absence of an applicable Act of Congress, Federal courts must fashion the governing rules."<sup>11</sup> Plainly, there is no requirement that the consideration of the question here involved be restricted to the laws and judicial decisions of the State of North Dakota.

It is a general rule that a meander line is not a line of boundary but one designed to point out the sinuosity of the bank or shore and as a means of ascertaining the quantity of the land in the fractional lot, the boundary line being the water line itself.<sup>12</sup> But there are a number of exceptions to this general rule. Thus, if the meander line was run where no lake or stream calling for it exists, or where it is established so far from the actual shore as to indicate fraud or mistake, the meander line is held to be the true boundary line.<sup>13</sup> Another well-established exception is that if, at the time a homestead entry is made, a large body of land previously formed by accretion existed between the meander line and the waters of the stream, then the meander line will be treated as the boundary line of the grant, and the patent will

<sup>9</sup> United States Constitution, Art. IV, Sec. 3, Cl. 2; *Ashwander v. Tennessee Valley Authority*, 297 U. S. 288, 330-333 (1936).

<sup>10</sup> *Clearfield Trust Co. v. United States*, 318 U. S. 363, 366 (1943); *Board of Commissioners of Jackson County v. United States*, 308 U. S. 343, 349-350 (1939).

<sup>11</sup> *Clearfield Trust Co. v. United States*, 318 U. S. 363, 367 (1943); *National Metropolitan Bank v. United States*, 323 U. S. 454, 456 (1945); *Vanston Committee v. Green*, 329 U. S. 156 (1946). See Notes, "Exceptions to *Erie v. Tompkins*; The Survival of Federal Common Law," 59 *Harv. L. Rev.* 966 (July 1946); *Solicitor's opinion*, 58 I. D. 694 (1944).

<sup>12</sup> *Railroad Company v. Schurmeir*, 7 Wall. (74 U. S.) 272, 286-287 (1868); *Hardin v. Jordan*, 140 U. S. 371, 380 (1891).

<sup>13</sup> *Security Land & Exploration Co. v. Burns*, 193 U. S. 167 (1904); *Lee Wilson & Co. v. United States*, 245 U. S. 24, 29 (1917); *Jeems Bayou Fishing & Hunting Club v. United States*, 260 U. S. 561, 564 (1923); *Niles v. Cedar Point Club*, 175 U. S. 300 (1899); *Horne v. Smith*, 159 U. S. 40 (1895); *Producers Oil Co. v. Hanzen*, 238 U. S. 325, 339 (1915); *Lammers v. Nissen*, 4 Nebr. 245 (1876), *aff'd* 154 U. S. 650 (1879); *French-Glenn Live Stock Co. v. Springer*, 185 U. S. 47, 52 (1902); *Rust-Owen Lumber Company*, 50 L. D. 678 (1924). See *Boundaries*, 9 C. J. sec. 70, pp. 190-191.

be construed to convey only the lands within that meander line.<sup>14</sup> This latter exception, which clearly is applicable to the present case, is the present rule of the Department.<sup>15</sup> Furthermore, the principle embodied in this exception has a number of advantages to commend it. The patentee does not acquire, at the time the patent is issued, a tract of land which is substantially in excess of the amount for which he has paid; certainly it is not reasonable that an entryman who received a patent for a tract of "34.98 acres" and who knew of its location in relation to the river, should now be permitted to claim that his patent awarded to him three and a half to four times the amount of land thus specified. Also, as in the present case, where some of the accreted lands are unsurveyed lands within the former bed of the Missouri River, this principle would avoid the prohibition against the making of an entry on unsurveyed lands.<sup>16</sup> It also avoids the difficulties encountered where the total of the platted land, plus accretions thereto, exceeds the permissible total specified by statute.<sup>17</sup> In addition, all persons dealing with the Government will be treated with equality; one homesteader in one State will not receive, in situations of this type, substantially more land than another homesteader in a different State who expends the same amount in labor and cash. In each instance, both the Government and the homesteader will know with fair certainty what has passed by the patent. And "identical transactions [will not be] subject to the vagaries of the laws of the several states."<sup>18</sup> Moreover, the rule as to the ownership of accreted lands is said to have had its foundation in the desire of courts to compensate riparian owners for the threat, often realized, that their lands may as well diminish as increase by reason of the water's action. It was thought to be equitable that the person who stands to lose by

<sup>14</sup> *Wittmayer v. United States*, 118 F. (2d) 808 (C. C. A. 9th, 1941); *United States v. Eldredge*, 33 F. Supp. 337 (D. C. Mont., 1940); *Mecca Land & Exploration Co. v. Schlecht*, 4 F. (2d) 256 (D. C. Ariz., 1925); *Granger v. Swart*, 1 Woolworth 88, Fed. Cas. No. 5685, 10 Fed. Cases 961, 962 (C. C. D. Wis., 1865); *First Nat. Bank of Decatur v. United States*, 59 F. (2d) 367 (C. C. A. 8th, 1932); *R. M. Stricker*, 50 L. D. 357 (1924); *Instructions of April 17, 1918*, 46 L. D. 461, 463-465; *Bissell v. Fletcher*, 19 Nebr. 725, 28 N. W. 303 (1886); 27 Nebr. 582, 43 N. W. 350 (1889). See *Chapman & Dewey Lumber Co. v. St. Francis Levee Dist.*, 232 U. S. 186 (1914); *Jones v. Johnston*, 18 How. (59 U. S.) 150, 157 (1855); *Johnston v. Jones*, 1 Black (66 U. S.) 209, 221 (1861); *Manual of Instructions for the Survey of the Public Lands of the United States*, sec. 520 (1930).

<sup>15</sup> *R. M. Stricker*, 50 L. D. 357 (1924); *Instructions of April 17, 1918*, 46 L. D. 461, 463-465. The earlier cases of *Harvey M. La Follette*, 26 L. D. 453 (1898); *John J. Serry*, 27 L. D. 330 (1898); *Gleason v. Pent*, 14 L. D. 375 (1892); *Lewis W. Pierce*, 18 L. D. 328 (1894), are hereby overruled to the extent of any conflict with this decision. See *Gleason v. White*, 199 U. S. 54 (1905). Cf. *Whitten v. Read*, 49 L. D. 253 (1922); 50 L. D. 10 (1923).

<sup>16</sup> *Ben McLendon*, 49 L. D. 548, 561 (1923).

<sup>17</sup> 43 U. S. C. secs. 211-224.

<sup>18</sup> *Clearfield Trust Co. v. United States*, 318 U. S. 363, 367 (1943).



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erosion of his lands should have the opportunity to gain by accretion.<sup>19</sup> But when a person in Madison's position, whose lot was approximately a half mile from the river at the time he made his entry, seeks the benefits without incurring the risk of the disadvantages of the rule, such a claim affronts the reason for the rule's existence. He is not deprived of what he is entitled to receive—lot 4, containing 34.98 acres.

Madison, however, urges that he nevertheless owns the accretion here involved on the basis of the decision by the Supreme Court of North Dakota in *Oberly v. Carpenter*, 67 N. Dak. 495, 274 N. W. 509 (1937), which involved a similar situation in the section adjacent to that in which Madison's lot is situated. In that case, one Oberly was the owner of lots 2, 3, and 4, and NE $\frac{1}{4}$ SW $\frac{1}{4}$  sec. 24, T. 137 N., R. 80 W., 5th P. M.<sup>20</sup> These lands were on the north bank of the Missouri River in 1899. These lands were homesteaded on August 31, 1914, by one Mary Gordin (Bismarck 018606) and patent 631715 issued to her on May 27, 1918. In 1933, one Jesse R. Carpenter and one Henry Plath made homestead entries (Bismarck 024299 and 024300, respectively) on lot 1, sec. 24, lots 1, 2, 3, and 4, and S $\frac{1}{2}$ NE $\frac{1}{4}$  sec. 25, T. 137 N., R. 80 W., 5th P. M.<sup>21</sup> These lands were on the south bank of the Missouri River in 1899. By 1933, the river had moved south through a large portion of the lands in the Carpenter and Plath entries and occupied the southern portion of those entries. The dry land in the record positions covered by their entries was now on the north bank of the river. Oberly then instituted a suit in the State court of North Dakota against Carpenter and Plath, claiming to own, by accretion to the lands described in the Gordin patent, all the lands in the Carpenter and Plath entries to the present north bank of the river. The Supreme Court of North Dakota found that the dry land south of the record position of the lands described in the Gordin patent, and north of the river, had been formed by accretion, not by avulsion. The court pointed out that there was no reservation stated in the patent, that the general rule is that the boundary line of lots along a water line is the water line itself and not the meander line, and held that Oberly was entitled to all such lands on the following ground (274 N. W. 509, 512):

The fact that the survey was made in 1899 and the patent was not issued until 1918 and in the meantime the river had retreated far from the shore

<sup>19</sup> *New Orleans v. United States*, 10 Pet. (35 U. S.) 662, 717 (1836); *Nebraska v. Iowa*, 143 U. S. 359, 360 (1892); *Jefferis v. East Omaha Land Co.*, 134 U. S. 178, 189, 191 (1890); *Banks v. Ogden*, 2 Wall. (69 U. S.) 57, 67 (1864); 2 Blackstone's Comm. 262 (1765).

<sup>20</sup> Oberly also owned lot 7, sec. 23, which is not shown on the sketches but lies adjacent on the west of lot 2, sec. 24.

<sup>21</sup> Carpenter's entry also included lot 4, sec. 26, which is not shown on the sketches but lies adjacent on the west of lot 4, sec. 25, and directly south of Oberly's lot 7, sec. 23.

line as it existed at the time of the survey makes no difference. "The patent passes the title of the United States to the land, not only as it was at the time of the survey, but as it is at the date of the patent, so that the United States does not retain any interest in any accretion formed between the survey and the date of the patent." *Jefferis v. East Omaha Land Company*, 134 U. S. 178, [195], 10 S. Ct. 518, 33 L. Ed. 872.

The *Jefferis* case, which was the prime basis upon which the Supreme Court of North Dakota rested the *Oberly* decision, treated a much narrower factual situation, however, than was involved in the *Oberly* case and in this case. The land involved in the *Jefferis* case, on the left bank of the Missouri River, in Iowa, was surveyed in 1851, the north boundary of it being on the Missouri River. In 1853, the lot was entered and paid for, and was patented in 1855 as lot 4. Afterwards, by mesne conveyances, made down to 1888, the lot was conveyed as lot 4, and became vested in the plaintiff. About 1853, new land was formed against the north line, and continued to form until 1870, so that then more than 40 acres had been formed by accretion. The defendant claimed to own a part of the new land by deed from one who had entered upon it. The plaintiff filed a bill to establish his title to the new land, claiming it as a part of lot 4. The Supreme Court pointed out that at the time of the entry the meander line of the river was the same or nearly the same as shown by such field notes and plat (134 U. S. at pp. 180, 194); that the United States never claimed any interest in the land so formed by accretion (134 U. S. at p. 182); that the new land "is an accretion to that originally purchased by the patentee from the United States" (134 U. S. at p. 189); and that the process of accretion began in 1853 at the time of the entry (134 U. S. at pp. 181, 191). The factual distinction between the *Jefferis* case and a case such as is here involved was clearly pointed out in the Department's Instructions of April 17, 1918 (46 L. D. 461, 463-465):

The facts in that case are widely different from those now under consideration. Here, the accretion was formed long before Johnson and Morris made their entries or claimed any interest in the land embraced therein. A considerable body of land had been formed and it cannot be doubted that the title to such accretion, prior to the entries, vested in the United States. To extend such entries to all the lands formed by accretion would increase their area beyond the 160 acres limited by law. Further, at the time of settlement and entry, it was apparent that the meander line of the 1874 survey was no longer correct, due to the changed conditions. \* \* \*

The Department's Instructions then held that in such case the applicable rule was that announced in *Granger v. Swart*, *supra* (foot-note 14):

If, at the date of an entry of government land, one of the boundaries of which is such meandered line, the lake or river extends to, and borders on, such line, accretions afterwards formed belong to the party holding title under the entry.

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But if, at the time the entry was made, between such line and the bank of the lake or river, there was a body of swamp, or waste land, or flats, on which timber and grass grew, horses and cattle fed, and hay was cut, such land was not included within the entry.

The quotation in the *Oberly* case from the *Jefferis* case was thus made without adequate limitation to the facts which were in issue in the *Jefferis* case. The rule stated in that quotation and the general rule that the water line, and not the meander line, is the boundary are applicable in those cases where the United States transfers its riparian rights by issuance of a patent to lands whose record positions do in fact border on or near a stream at the time of entry or patent. They are not applicable to those cases where, at the time of entry and patent, a substantial area of land exists between the record meander line and the actual water line. Such generalizations may not properly be removed from their context and applied to a case such as this, which is governed by other doctrines more precisely applicable to the specific facts involved. The *Oberly* decision therefore does not rest upon a sufficiently adequate basis to furnish support to Madison's claim to the lands south of the meander line of lot 4. The entry on his lot 4 was made at a time when there was a substantial amount of land between the meander line of lot 4 and the water line of the river. At that time lot 4 was nowhere near the river and was not riparian, nor has it been riparian since then. What the character of lot 4 may have been, whether riparian or otherwise, prior to the entry is, as so well stated by Circuit Judge Gardner of the Eighth Circuit Court of Appeals (which includes the State of North Dakota) in the case of *First National Bank of Decatur v. United States*, 59 F. (2d) 367, 369 (C. C. A. 8th, 1932)—

\* \* \* a closed book and cannot be inquired into. If this were not the rule owners might be divested of their property, and titles might be challenged and clouded by proof of geological and topographical changes and formations reaching back to antediluvian periods or prehistoric times. What may have transpired to affect these lands while title thereto remained in the government, and before their selection or entry by the \* \* \* defendant's \* \* \* can be of no concern \* \* \* to defendant \* \* \*. The patents of the lands to which defendant has title describe the lands allotted according to the subdivisions thereof so platted, and recite the number of acres so allotted according to the acreage described in the government survey.

The specification in the patent of "34.98 acres," compared to the large acreage claimed by Madison, is not an immaterial factor in determining what was passed by the patent.<sup>22</sup> Ernest Madison went on lot 4 knowing these facts.<sup>23</sup> The patent must be held, under these circum-

<sup>22</sup> *Chapman & Dewey Lumber Co. v. St. Francis Levee Dist.*, 232 U. S. 136, 197 (1914); *Security Land and Exploration Co. v. Burns*, 193 U. S. 167, 180 (1904).

<sup>23</sup> See *Gleason v. White*, 199 U. S. 54 (1905).

stances, to have conveyed exactly what it purports to convey, i. e., only the 34.98 acres of land within the meander line, not the substantial amount of accreted land in addition to lot 4.<sup>24</sup> Accordingly, Madison's asserted claim is without sufficient basis to deprive the lands entered by Basart of their status as public lands of the United States.

But this does not mean that the suspension of Basart's entry may properly be lifted at this time and his entry allowed to proceed to patent.

So long as the *Oberly* decision stands unimpaired, it affects the lands in Basart's entry in two ways: (1) Since the accreted lands in the *Oberly* case appear to be indistinguishable in principle from the accreted lands in this case,<sup>25</sup> the likelihood that the State courts of North Dakota would adhere to the *Oberly* decision would becloud the title Basart would get by the issuance of a patent to him; (2) the *Oberly* decision constitutes a direct cloud on the title of the United States to the lands in Basart's entry. Although the Supreme Court of North Dakota did not, in the *Oberly* decision, indicate the exact boundaries of the lands which it held to have accreted to Oberly's lands or how the side lines of the accreted lands should be drawn, it appears that a proper extension of the side lines of that accretion would include part of the Basart homestead lands. The general rule for the establishment of side lines to divide alluvium or accreted lands between adjoining riparian owners is to run dividing lines so that each proprietor has such proportion of the new shore line as he had of the old shore line. This is appropriately accomplished as follows: (1) Measuring the whole ancient line of the river affecting the area involved and computing the length of the portion of that line owned by each riparian proprietor; (2) then measuring the whole length of the shore line of the accreted areas and appropriating to each proprietor such proportion of the new line as he had of the old line; and (3) then drawing the side lines from the points at which the proprietors respectively bounded on the old line to the points thus determined as the points of division on the new line.<sup>26</sup> One of the sketches indicates the approxi-

<sup>24</sup> See *Chapman & Dewey Lumber Co. v. St. Francis Levee Dist.*, 232 U. S. 186, 197 (1914). Cf. *Myrtle White*, 56 I. D. 300 (1938).

<sup>25</sup> The investigations made by this Department in connection with Basart's entry, although not focused on the lands involved in the *Oberly* decision, covered the general area of those lands and indicate, as do the recitals in the *Oberly* decision, that the accreted areas dealt with in the *Oberly* decision had accreted prior to the Gordin entry on the lands owned by Oberly.

<sup>26</sup> *Jones v. Johnston*, 18 How. (59 U. S.) 150, 158 (1855); *Johnston v. Jones*, 1 Black (66 U. S.) 209, 222-223 (1861); Secretary Finney's Instructions of December 22, 1923, 50 L. D. 216, 218; *R. M. Stricker*, 50 L. D. 357, 358 (1924); Clark, "A Treatise on the Law of Surveying and Boundaries," secs. 251, 252, pp. 274-276 (2d ed., 1939); Skelton, "The

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mate side lines, thus determined, of the accretions to the record positions of lot 4, sec. 19, and lot 5, sec. 24. It will be seen that these accretion side lines do not run cardinal to the survey lines but approximately normal to the present river line. Thus, less than a third of the area of the dry land in the record position covered by Basart's entry is within the accretions to the record position of Madison's lot 4; a substantial portion of the dry land in the record position covered by Basart's entry is within the accretions which properly belong to the riparian owner of lot 5, sec. 24, whose entry, made in 1895, did have, unlike Madison's entry, riparian rights to the accretions formed on the shore line of that lot; and the larger portion of the dry land in the record position of Basart's homestead entry lies within the accretions to the record position of the lands owned by Oberly. This general rule for the establishment of side lines in the apportionment of accretion between adjacent owners of riparian lands on a river is the rule of law followed by the courts of North Dakota.<sup>27</sup> Consequently, it is apparent that the *Oberly* decision beclouds the title of the Federal Government not only to the public lands in the former Carpenter and Plath entries (which have since been respectively canceled and relinquished), but also to some of the public lands in the Basart entry.

Under these circumstances, the Department is under an obligation to its homestead entryman to take affirmative action to protect his entry and the validity of the patent which he may earn by compliance with the homestead laws,<sup>28</sup> and also is under a duty to recommend to the Attorney General the institution of a suit in the Federal courts in North Dakota to remove this cloud from these lands. The United

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Legal Elements of Boundaries and Adjacent Properties," sec. 297 (6), p. 338 (1930); Gould, "A Treatise on the Law of Waters, Including Riparian Rights," secs. 162-164, pp. 321-325 (3d ed., 1900); *City of Peoria v. Central Nat. Bank*, 224 Ill. 43, 79 N. E. 296 (1906); 3 Farnham, "Waters and Water Rights," pp. 2475, 2477, 2481 (1904); Note, 35 Am. St. Rep. 307, 311 (1892); 1 R. C. L. (Accretion), secs. 20-21, pp. 244-246 (1914), and numerous cases cited.

<sup>27</sup> *Gardner v. Green*, 67 N. Dak. 268, 271 N. W. 775, 783 (1937). In the *Oberly* case, Oberly had claimed to own by accretion all the land in the Carpenter and Plath entries. These entries were within the same north-south cardinal survey lines as Oberly's lands. One of the exhibits in the *Oberly* case was a sketch purporting to show the side lines of accretion as running coterminously with the cardinal survey lines (exhibit D, case 6457, filed in the office of the Clerk of the Supreme Court of North Dakota on January 11, 1937, a copy of which is in the Department's file on the homestead entry of one Everett Davis (Bismarck 024564), covering the same lands previously covered by Plath's homestead entry). No question appears to have been raised in the *Oberly* case as to the correctness of the side lines of accretion claimed by Oberly. Since the *Gardner* decision was cited with approval and relied on in the *Oberly* decision, both being decided less than 4 months apart, it seems clear that it was not intended in the *Oberly* decision to depart from the established rule, so meticulously set forth in the *Gardner* decision, for apportioning accretions between adjoining riparian owners.

<sup>28</sup> *Hughes v. United States*, 4 Wall. (71 U. S.) 232; 235-236 (1866); *United States v. Beebe*, 127 U. S. 338, 342 (1888). See *Chapman & Dewey Lumber Co. v. St. Francis-Levee Dist.*, 232 U. S. 186, 190 (1914).

States, not having been a party to the *Oberly* case, could not be deprived of its title by a decision of the North Dakota court.<sup>29</sup>

Furthermore, it should be noted that the established practice of the Government, in disposing of the public land, has been to base the disposal on the area of dry land, leaving to the State law the determination of the effect of such disposal on the title to the lands under the bed of the river or lake.<sup>30</sup> In this case, almost half of the record position of the described areas listed in Basart's entry is at present beneath the waters of the Missouri River. In addition, a portion of the dry lands in Basart's entry clearly belongs, by accretion, to the owner of lot 5, sec. 24. Under such circumstances, it would be inappropriate to issue to Basart a patent based on the survey of 1899, if such patent is earned by him under the homestead laws. Another segregative survey of the accreted lands here involved is necessary.

Basart's motion for rehearing is granted except insofar as he requests an oral hearing. An oral hearing is unnecessary since there appears to be no dispute as to the applicable facts. The case will be remanded to the Bureau of Land Management to take the following action: (1) To continue in effect the suspension of Basart's entry until further order by the Department; (2) to order a segregative survey of the accretions to the record positions of lot 4, sec. 19, T. 137 N., R. 79 W., 5th P. M., and of lot 7, sec. 23,<sup>31</sup> and lots 2, 3, and 4, of sec. 24, T. 137 N., R. 80 W., 5th P. M.;<sup>32</sup> and (3) to draft a request to the Attorney General for institution of a suit to quiet the title of the United States to all the accreted lands formed south of the 1899 record positions of lot 4, sec. 19, T. 137 N., R. 79 W., 5th P. M., North Dakota, and lot 7, sec. 23, and lots 2, 3, and 4, sec. 24, T. 137 N., R. 80 W., 5th P. M., North Dakota.

Since final proof has not yet been submitted on Basart's entry, there is no need at this time to consider the question of whether the

<sup>29</sup> *Carr v. United States*, 98 U. S. 433 (1878); *Hussey v. United States*, 222 U. S. 88, 93 (1911); *Oklahoma v. Texas*, 258 U. S. 574, 591 (1922). Several of the North Dakota decisions cited and relied on in the *Oberly* decision had specifically noted that the United States had not claimed to own any of the land between the meander lines and the shore lines involved in those cases. *Heald v. Yumisko*, 7 N. Dak. 422, 75 N. W. 806, 808 (1898); *Brignall v. Hannah*, 34 N. Dak. 174, 157 N. W. 1042, 1045 (1916); *Roberts v. Taylor*, 47 N. Dak. 146, 181 N. W. 622, 626 (1921).

<sup>30</sup> *Hardin v. Jordan*, 140 U. S. 371, 380 (1891); *Andrew A. Malcolm*, 50 L. D. 284 (1924); *Scott v. Lattig*, 227 U. S. 229 (1913); *United States v. Chandler-Dunbar Water Power Co.*, 229 U. S. 53, 60 (1913); *Archer v. Greenville Sand and Gravel Co.*, 233 U. S. 60 (1914); *Philadelphia Co. v. Stimson*, 223 U. S. 605 (1912); *Arkansas v. Tennessee*, 246 U. S. 158, 175-176 (1918); *Rex Baker*, 58 L. D. 242 (1942). *Cf.* North Dakota Revised Code of 1943, secs. 47-0605, 47-0607.

<sup>31</sup> Lot 7, sec. 23, now owned by Oberly, lies adjacent on the west of lot 2 of sec. 24, although not shown on the sketches, and was part of the Gordin entry lands involved in the *Oberly* decision and lying due north of the Government-owned lands formerly in the Carpenter entry.

<sup>32</sup> *Kirwan v. Murphy*, 189 U. S. 35 (1903); *Knight v. United States Land Association*, 142 U. S. 161 (1891); *New Orleans v. Paine*, 147 U. S. 261 (1893).

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existing dry land within the record position of Basart's entry, the surface of which had been washed away since 1899 and which for a time lay in the bed of the river but was later restored, is therefore unsurveyed lands precluding his entry, even though the lines of the 1899 plat may be reestablished by reference to other corners of the survey. *Cf. Towl v. Kelly et al.*, 54 I. D. 455, 462 (1934).

OSCAR L. CHAPMAN,  
*Under Secretary.*

**STATUS OF UNIT OPERATION AGREEMENT—  
DENVER PRODUCING AND REFINING COMPANY**

**Oil and Gas Leases—Indian Lands.**

Under a provision for the continuance in full force and effect for so long as oil or gas can be produced in commercial quantities of an agreement by which the Denver Producing and Refining Company undertook to operate, as a unit, a block of oil leases on restricted Indian land, the agreement remains fully effective so long as an oil well drilled within the unit area produces oil in quantities sufficient for operation at a profit even though the operation as a whole, including expenditures for development and equipment, results in a loss.

To produce oil in commercial quantities it is not essential that the returns from the well repay the drilling costs.

An obligation to exercise due diligence in drilling additional wells is not met by an operator who has drilled but one well in a period of 10 years, and further drilling may be required upon written notice, as provided in the agreement of the parties.

M-34572

FEBRUARY 18, 1947.

**TO THE COMMISSIONER OF INDIAN AFFAIRS.**

You have requested my opinion as to whether an agreement approved by the Department on October 23, 1935, by which oil and gas leases on 67 tracts of restricted allotted Indian lands under the jurisdiction of the Kiowa Indian Agency in Oklahoma were to be developed as a unit by the Denver Producing and Refining Company, has terminated. Fifty of the leases were subsequently surrendered by the Company, so that the agreement now covers only 17 tracts of Indian land.

It is my opinion that the agreement is now in full force and effect.

On the date of the approval of the agreement, the operator had completed a producing well on what is known as its No. 1 Adah Noe lease, and was engaged in the drilling of a second well on what is known as its No. 1 Sah Cam lease, which well it undertook to, and did, complete to a depth of 13,842 feet. The second well was non-productive.

Section VIII (b) of the agreement provides that the completion of a well "either heretofore or hereafter anywhere in said unit area as a commercial producer shall continue this agreement in force, as provided in Section XV hereof." Section XV provides that the agreement—

\* \* \* shall remain in effect until the completion of a well producing oil and/or gas in commercial quantities upon the unit area, except as provided in paragraph VIII hereof, and so long thereafter as oil and/or gas can be produced in commercial quantities from the unit area \* \* \*.

Under these provisions of the agreement, it is clear that if the well which had been completed at the time of the approval of the agreement was then producing oil or gas in commercial quantities, the existence of that well made the agreement effective and continued it in effect so long as the well was capable of producing oil or gas in commercial quantities.

It is not open to question that the well did in fact produce oil in commercial quantities at the time of its completion. Later, in 1936, the operator reported that the well was producing about 50 barrels of oil per day. That the well was a commercial producer, thus continuing the agreement in effect, received departmental recognition in the granting of permission to suspend further drilling operations from year to year down to and including 1942. The status of the agreement seems not to have been questioned until August 25, 1945, on which date the Department notified the operator to show cause why the agreement should not be declared to have terminated. The notice was occasioned by information from the field indicating that the well had ceased to produce and that efforts to restore its production had failed. In responding to the notice, the operator, by letter dated December 13, 1945, called attention to the fact that repairs to the well and the installation of a pumping outfit would enable it to produce an average of 10 to 12 barrels of oil per day, and expressed the view that although the operation as a whole, taking into account the cost of drilling and equipment, might result in a loss, a profit would nevertheless be realized over the nominal operating cost, which profit could be applied in recoupment of its expenditures for development and equipment. The operator also called attention to the fact that termination of the agreement would result in a loss to the Indians of rentals from the date of termination, amounting to \$2,902.67 a year. The statement of the operator with respect to restoration of production through pumping operations is confirmed by a report dated December 10, 1946, from the Acting Director of the Geological Survey. That report shows a gradual increase in production from 6.14 barrels per day in February of 1946 to 19.6 barrels in September of that year.

To produce oil in commercial quantities, it is not essential that the



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returns from the well repay the drilling costs. If the returns exceed the cost of operation after completion of the well, that is sufficient, even though the operation as a whole results in a loss.<sup>1</sup>

The report of the Geological Survey confirms the judgment of the operator in the present case that the well in question can be operated at a profit. It follows that the agreement, unless otherwise lawfully terminated, will continue in full force and effect so long as that condition exists.

In reaching the conclusion stated above, I deem it advisable to call attention to the fact that the unit agreement not only required the operator to complete the well that was being drilled at the time of the approval of the agreement, but that it also expressly obligates the operator to drill with reasonable diligence additional wells looking to the recovery of the maximum yield of oil and gas underlying the unit area. As the operator has drilled but one well in a period of more than 10 years, it seems obvious that this covenant on the operator's part has not been met.<sup>2</sup> Section VIII (d) of the agreement obligates the operator to commence drilling operations within 90 days after the receipt of notice so to do, if the drilling requirements are not being conducted with reasonable diligence. I suggest that you serve such notice on the operator immediately.

MASTIN G. WHITE,  
*Solicitor.*

**APPLICATION OF SECTION 4, ADMINISTRATIVE PROCEDURE ACT,  
TO REGULATIONS CLOSING PRIVATE LANDS UNDER AUTHORITY  
OF MIGRATORY BIRD TREATY ACT**

**Fish and Wildlife Service—Migratory Bird Treaty Act—Administrative  
Procedure Act.**

Regulations under the Migratory Bird Treaty Act (40 Stat. 755; 16 U. S. C. sec. 704), prohibiting the taking of migratory birds on privately owned lands, do not pertain to a "foreign affairs function" or to "public property," as those terms are used in section 4 of the Administrative Procedure Act (5 U. S. C. sec. 1003). The procedure prescribed in that section should be followed in connection with the issuance of such regulations.

M-34864

FEBRUARY 18, 1947.

TO THE DIRECTOR, FISH AND WILDLIFE SERVICE.

On November 20, 1946, Acting Secretary Chapman signed regulations under the Migratory Bird Treaty Act of July 3, 1918 (40 Stat.

<sup>1</sup> See *Denker v. Mid-Continent Petroleum Corporation*, 56 F. (2d) 725, 727 (C. C. A. 10th, 1932), in which the court ruled that 3 barrels a day constitute paying production, stating, "Such wells usually continue to produce for a long period of time. It is common knowledge that three-barrel wells under normal conditions can be operated at a profit."

<sup>2</sup> See *Sauder v. Mid-Continent Petroleum Corp.*, 292 U. S. 272 (1934).

755; 16 U. S. C. sec. 704), which designate as a closed area "all areas of land and water in Dade and Monroe Counties, Florida, not now owned or controlled by the United States" within a boundary specified in the regulations.

The Department of Justice has raised the question whether these regulations relating to the hunting of migratory birds on private lands are not subject to the requirements of section 4 of the Administrative Procedure Act (5 U. S. C. sec. 1003).

Section 4 of the Administrative Procedure Act prescribes the procedure which is to be followed by Government agencies in making rules. It is applicable to every instance of the exercise of the rule-making power—

Except to the extent that there is involved (1) any military, naval, or foreign affairs function of the United States or (2) any matter relating to agency management or personnel or to public property, loans, grants, benefits, or contracts.

It is obvious at first glance that the migratory bird regulations of November 20, 1946, do not relate to military or naval functions, to agency management or personnel, or to loans, grants, benefits, or contracts, and hence do not fall within any of these exceptions to section 4 of the Administrative Procedure Act. It is only necessary, therefore, to consider whether the regulations relate to a "foreign affairs function" (inasmuch as the Migratory Bird Treaty Act is designed to effectuate the provisions of the treaties between the United States and Great Britain and between the United States and Mexico for the protection of migratory birds) or to "public property."

Insofar as the exception relating to a "foreign affairs function" is concerned, the House Committee on the Judiciary made the following statement in explaining the exception (see Administrative Procedure Act, Legislative History, S. Doc. 248, 79th Cong., 2d sess., 1946, at p. 257):

\* \* \* The phrase "foreign affairs functions," [sic] used here and in some other provisions of the bill, is not to be loosely interpreted to mean any agency operation merely because it is exercised in whole or part beyond the borders of the United States but only those "affairs" which so affect the relations of the United States with other governments that, for example, public rule-making provisions would provoke definitely undesirable international consequences. \* \* \*

Clearly, regulations under the Migratory Bird Treaty Act that close areas in the United States to hunting do not involve the type of "foreign affairs function" which Congress intended to except from the requirements of section 4 of the Administrative Procedure Act. The public conduct of proceedings leading to issuance of such regulations could not reasonably be expected to "provoke definitely undesirable international consequences." The mere fact that the regulations derive their ultimate authority, through the Migratory Bird Treaty Act,

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from the provisions of treaties between the United States and foreign nations does not make the issuance of such regulations a "foreign affairs function," within the meaning of that phrase as used in section 4 of the Administrative Procedure Act.

The exact scope of the term "public property," as used by Congress in granting an exception to section 4 of the Administrative Procedure Act, is more difficult to determine. The legislative history on the point is meager. The indications are, however, that the conventional connotations were attached to the term "property." In the House, the member in charge of the bill, Mr. Walter, stated: "The exemption of proprietary matters is included because in those cases the Government is in the position of an individual citizen and is concerned with its own property, funds, or contracts." (S. Doc. No. 248, 79th Cong., p. 358.) In addition, the Report of the House Committee on the Judiciary (S. Doc. No. 248, 79th Cong., p. 257) stated that "The term 'public property' would include property held by the United States in trust or as guardian, as Indian property is often held."

Because the legislative history of the statute does not furnish a clear answer to the question as to the meaning of the term "public property," it seems advisable to study the decisions concerning control by the sovereign of wildlife within its borders in order to determine whether migratory birds on private lands are "public property" within the meaning of the term as employed by the Congress in section 4 of the Administrative Procedure Act.

There are cases which either hold squarely or indicate by way of dictum that the State, as the sovereign power, holds the title to animals or birds *ferae naturae* within its borders. The same result is reached where a Territory is concerned and the Federal Government is the sovereign.

Thus, in *Anderson v. Smith*, 71 F. (2d) 493 (C. C. A. 9th, 1934), where the validity of an Alaska statute imposing a license fee on non-resident fishermen was involved, the court observed:

\* \* \* In Alaska, however, the wild fish and game belong to the United States, except in so far as they have been given to the Territory of Alaska. \* \* \*

In *McCready v. Virginia*, 94 U. S. 391 (1876), the Supreme Court, in approving the validity of a Virginia statute prohibiting nonresidents from planting oysters in the soil covered by her tidewaters, uttered the following dictum:

\* \* \* In like manner, the States own the tide-waters themselves; and the fish in them, so far as they are capable of ownership while running. For this purpose the State represents its people, and the ownership is that of the people in their united sovereignty. \* \* \*

In the leading Massachusetts case of *Dapson v. Daly*, 257 Mass. 195, 153 N. E. 454 (1926), where title to the carcass of a deer that had been

shot and wounded by an unlicensed hunter was in issue, the Supreme Judicial Court stated the Massachusetts law thus:

In this commonwealth the title to wild animals and game is in the commonwealth in trust for the public, to be devoted to the common welfare. \* \* \*

The concept that animals and birds *ferae naturae* are the property of the State received its strongest support from the decision of the Supreme Court in *Geer v. Connecticut*, 161 U. S. 519 (1896), where the constitutionality of a Connecticut statute governing the killing and transporting out of the State of certain game birds was upheld. The Court, after an exhaustive review of both civil and common law sources, concluded that—

\* \* \* for the purpose of exercising this power [over animals and birds *ferae naturae*], the State \* \* \* represents its people, and the ownership is that of the people in their united sovereignty. The common ownership, and its resulting responsibility in the State, is thus stated in a well considered opinion of the Supreme Court of California:

"The wild game within a State belongs to the people in their collective sovereign capacity. It is not the subject of private ownership except in so far as the people may elect to make it so; \* \* \*."

As has been shown, the cases which speak of title to or ownership of wild animals or birds place the title or ownership in the States, not in the Federal Government. The exception of "public property" from the purview of section 4 extends only to property of the United States. Consequently, the exception would not cover rules regulating the taking of wild game on lands other than those of the Government. Moreover, the regulation of the taking of wild animals or birds would seem to rest more soundly on the police power than on title. The decisions subsequent to *Geer v. Connecticut* tend to justify the regulation of the taking of wildlife under the police power rather than under a conception of ownership. See, for example, *Sils v. Hesterberg*, 211 U. S. 31 (1908), and *Kennedy v. Becker*, 241 U. S. 556 (1916). Sometimes both concepts are used, as by the Supreme Court in *Lacoste v. Department of Conservation of the State of Louisiana*, 263 U. S. 545 (1924). When the question of the constitutionality of the Migratory Bird Treaty Act reached the Supreme Court in the case of *Missouri v. Holland*, 252 U. S. 416 (1920), the State of Missouri utilized the concept of its ownership of migratory birds as a basis for attacking the statute. This contention was disposed of by the Court in the following language (p. 434):

The State as we have intimated founds its claim of exclusive authority upon an assertion of title to migratory birds, an assertion that is embodied in statute. No doubt it is true that as between a State and its inhabitants the State may regulate the killing and sale of such birds, but it does not follow that its authority is exclusive of paramount powers. To put the claim of the State upon title is to lean upon a slender reed. Wild birds are not in the possession of anyone; and possession is the beginning of ownership. The whole foundation of the

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State's rights is the presence within their jurisdiction of birds that yesterday had not arrived, tomorrow may be in another State and in a week a thousand miles away. If we are to be accurate we cannot put the case of the State upon higher ground than that the treaty deals with creatures that for the moment are within the State borders, that it must be carried out by officers of the United States within the same territory, and that but for the treaty the State would be free to regulate this subject itself.

Accordingly, it is my opinion that the regulations of November 20, 1946, and other regulations relating to the taking of migratory birds on privately owned lands do not pertain to "public property," as that term is used in the exception to section 4 of the Administrative Procedure Act.

I suggest that the regulations of November 20, 1946, be withdrawn, and that the procedure prescribed in section 4 of the Administrative Procedure Act be followed in connection with the issuance of regulations governing the taking of migratory birds on privately owned lands.

MARTIN G. WHITE,  
*Solicitor.*

**ANGELA TINTA MARTIN v. ELIZABETH LORD ET AL.**

**A-23926**

*Decided February 19, 1947*

**Conflicting Railroad Grant Lands—Interest Forfeited to United States.**

Where place grants of two or more railroads under the same statute are in conflict, each company would receive an equal undivided moiety to the conflicting lands. Upon forfeiture of one railroad's grant, its undivided moiety reverted in the United States.

**Application to Purchase Undivided Moiety Under Section 5 of Act of March 3, 1887.**

The owner of the vested moiety of the constructed railroad is eligible, under section 5 of the act of March 3, 1887 (24 Stat. 556, 557; 43 U. S. C. sec. 898), to purchase from the United States the reverted forfeited moiety in the conflicting place grant. Where one applicant claims to own the constructed railroad's moiety through a record chain of conveyances and another applicant claims to own that moiety by adverse possession, the question of such ownership being then pending in the courts, neither person has established that he is the owner of the privately owned moiety and thus eligible to purchase the Government's moiety under section 5 of the 1887 act. In the circumstances of this case, it is unnecessary now to determine whether a person acquiring the title to the privately owned moiety by adverse possession is an eligible purchaser under section 5 of the 1887 act.

**Color of Title Act—Conflicting Claims.**

No patent may be issued under the Color of Title Act of December 22, 1928 (45 Stat. 1069; 43 U. S. C. secs. 1068, 1068a), for any tract to which there is a

conflicting claim adverse to that of the applicant, unless and until such claim shall have been finally adjudicated in favor of such applicant.

#### MOTION FOR REHEARING

Mrs. Elizabeth Lord, for herself and four others,<sup>1</sup> all hereinafter referred to as Lord, filed an application (G. L. O. 08911) to purchase, under section 5 of the act of March 3, 1887,<sup>2</sup> the undivided half interest which the United States owns in the approximately 78.22 acres of land in the S½NE¼ sec. 35, T. 11 S., R. 6 E., Huntsville M., Alabama. Within the period of publication on the Lord application, Mrs. Angela Tinta Martin filed a protest against the sale to Lord, and thereafter Martin filed her own application (G. L. O. 09649) to purchase this half interest of the United States. The Department's decision of January 15, 1946 (A-23926), held that neither Lord nor Martin was eligible to purchase this half interest under the 1887 act, but that Martin has shown a sufficient *prima facie* basis to enable her to file an application to purchase the Government's interest under the Color of Title Act of December 22, 1928.<sup>3</sup> Martin has now filed an applica-

<sup>1</sup> Winifred S. Mercke, Emma L. Rodman, Marie S. Wheeler, and Marguerite I. Isaacs, all apparently the sisters of Mrs. Lord.

<sup>2</sup> 24 Stat. 556, 557; 43 U. S. C. sec. 898:

"Sec. 5. That where any said company shall have sold to citizens of the United States, or to persons who have declared their intention to become such citizens, as a part of its grant, lands not conveyed to or for the use of such company, said lands being the numbered sections prescribed in the grant, and being coterminous with the constructed parts of said road, and where the lands so sold are for any reason excepted from the operation of the grant to said company, it shall be lawful for the bona fide purchaser thereof from said company to make payment to the United States for said lands at the ordinary Government price for like lands, and thereupon patents shall issue therefor to the said bona fide purchaser, his heirs or assigns: *Provided*, That all lands shall be excepted from the provisions of this section which at the date of such sales were in the bona fide occupation of adverse claimants under the pre-emption or homestead laws of the United States, and whose claims and occupation have not since been voluntarily abandoned, as to which excepted lands the said pre-emption and homestead claimants shall be permitted to perfect their proofs and entries and receive patents therefor: *Provided further*, That this section shall not apply to lands settled upon subsequent to the first day of December, eighteen hundred and eighty-two, by persons claiming to enter the same under the settlement laws of the United States, as to which lands the parties claiming the same as aforesaid shall be entitled to prove up and enter as in other like cases."

Applications under this section are governed by the Department's regulation of February 13, 1889, 8 L. D. 348, 351, 43 CFR 273.5. Section 5 of the 1887 act confers not a vested right, but merely a privilege to purchase the land within the numbered sections prescribed in, but excepted from, the railroad grant. *Buckholts v. Anderson*, 56 I. D. 44 (1936).

<sup>3</sup> 45 Stat. 1069; 43 U. S. C. secs. 1068, 1068a:

"\* \* \* That whenever it shall be shown to the satisfaction of the Secretary of the Interior that a tract of public land, not exceeding one hundred and sixty acres, has been held in good faith and in peaceful, adverse, possession by a citizen of the United States, his ancestors or grantors, for more than twenty years under claim or color of title, and that valuable improvements have been placed on such land, or some part thereof has been reduced to cultivation, the Secretary may, in his discretion, upon the payment of not less than \$1.25 per acre, cause a patent to issue for such land to any such citizen: *Pro-*

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tion under the Color of Title Act. Lord has filed a motion for rehearing.

The land here involved is within the conflicting 6-mile primary limits of the authorized railroad lines of the Alabama and Chattanooga Railroad Company<sup>4</sup> and of the Coosa and Chattooga Railroad Company, both of which were beneficiaries of the odd-numbered section grant made to the State of Alabama by the act of June 3, 1856,<sup>5</sup> each company to receive an equal undivided moiety to the lands within the conflicting place limits of the grant.<sup>6</sup> Under this grant, the State of Alabama was a trustee of the granted lands, for the benefit of each railroad company as to lands earned by construction of its railroad line in accordance with the statute, and for the benefit of the United States as to unearned lands.<sup>7</sup> The equal undivided moiety granted for one road was neither granted nor could it be used for the other

*vided*, That where the area so held is in excess of one hundred and sixty acres the Secretary may determine what particular subdivisions, not exceeding one hundred and sixty acres, may be patented hereunder: *Provided further*, That coal and all other minerals contained therein are hereby reserved to the United States; that said coal and other minerals shall be subject to sale or disposal by the United States under applicable leasing and mineral land laws, and permittees, lessees, or grantees of the United States shall have the right to enter upon said lands for the purpose of prospecting for and mining such deposits: *And provided further*, That no patent shall issue under the provisions of this Act for any tract to which there is a conflicting claim adverse to that of the applicant, unless and until such claim shall have been finally adjudicated in favor of such applicant.

"Sec. 2. That upon the filing of an application to purchase any lands subject to the operation of this Act, together with the required proof, the Secretary of the Interior shall cause the lands described in said application to be appraised, said appraisal to be on the basis of the value of such lands at the date of appraisal, exclusive of any increased value resulting from the development or improvement of the lands by the applicant or his predecessors in interest, and in such appraisal the Secretary shall consider and give full effect to the equities of any such applicant."

<sup>4</sup> Successor to the Wills Valley Railroad Company. See *Wallace v. Loomis*, 97 U. S. 146, 154 (1877); *United States v. Alabama State Land Co.*, 14 L. D. 129, 130 (1892); *Swann & Billups v. Lindsey*, 70 Ala. 507 (1881).

<sup>5</sup> 11 Stat. 17, as amended by the acts of March 3, 1857 (11 Stat. 200); April 10, 1869 (16 Stat. 45); and March 3, 1871 (16 Stat. 580). The tract here involved was certified to the State of Alabama by the Secretary of the Interior in Clear List No. 13 on July 26, 1884, such certification being the equivalent of a patent. *Frasher v. O'Connor*, 115 U. S. 102 (1885).

<sup>6</sup> *Southern Pacific Railroad Co. v. United States*, 183 U. S. 519, 525 (1902); *Sioux City & St. Paul Railroad Co. v. United States*, 159 U. S. 349, 365 (1895); *United States v. Tennessee & Coosa Railroad Co.*, 176 U. S. 242 (1900); *St. Paul & Sioux City R. R. Co. v. Winona & St. Peter R. R. Co.*, 112 U. S. 720 (1885); *Sioux City & St. Paul Railroad Co. v. Chicago, Milwaukee & St. Paul Railway Co.*, 117 U. S. 406 (1886); *Galloway v. Doe ex dem. Henderson*, 136 Ala. 315, 34 So. 957 (1903); *McCarver v. Herzberg*, 120 Ala. 523, 25 So. 3, 4 (1898).

<sup>7</sup> *Benner v. Lane*, 116 Fed. 407, 415 (C. C. N. D. Iowa, 1902), *aff'd* 140 Fed. 987 (C. C. A. 8th, 1905), pursuant to mandate of 198 U. S. 579 (1905); *Sioux City & St. Paul Railroad Co. v. United States*, 159 U. S. 349, 364 (1895); *Knepper v. Sands*, 194 U. S. 476, 481, 484 (1904); *Alabama & Chattanooga R. R. Co.*, 8 L. D. 33, 37 (1889); *Swann & Billups v. Lindsey*, 70 Ala. 507, 520-521 (1881); *Sullivan v. Van Kirk Land & Construction Co.*, 124 Ala. 225, 26 So. 925, 928 (1899); *McCarver v. Herzberg*, 120 Ala. 523, 25 So. 3, 4 (1898).

road;<sup>8</sup> nor did the State of Alabama even purport to do so.<sup>9</sup> The Coosa-Chattooga Railroad, however, was never completed opposite the tract here involved and the Coosa-Chattooga interest in the land was, therefore, forfeited to the United States and declared to be part of the public domain by the act of September 29, 1890,<sup>10</sup> and is now owned by the United States. The railroad of the Alabama and Chattanooga Railroad Company was constructed opposite this tract and that company's title to its undivided moiety in this land became complete. Upon the bankruptcy of the latter railroad, the State of Alabama purchased the railroad's lands and in 1877 conveyed these lands to Billups and Swann, Trustees.<sup>11</sup>

Both Lord and Martin claim to own the Alabama-Chattanooga moiety.

Lord claims under a series of conveyances and transfers of the title to the tract of land here involved, stemming from the Alabama and Chattanooga Railroad Company through the State of Alabama and Billups and Swann, and culminating in a decree obtained on May 2, 1940, by Lord in the circuit court of Etowah County, Alabama, against certain ancestors in title holding that the Lord group was vested with the "indefeasible title to the whole interest in said S½NE¼ unconditionally."<sup>12</sup> Lord also relies on a default decree which Lord obtained on February 16, 1942, in a common law ejectment suit against Martin's tenants on the land here involved,<sup>13</sup> and

<sup>8</sup> Section 1 of the granting act of June 3, 1856, specifically provided:

"\* \* \* That the lands hereby granted for and on account of said roads, severally, shall be exclusively applied in the construction of that road for and on account of which such lands are hereby granted, and shall be disposed of only as the work progresses, and the same shall be applied to no other purpose whatsoever: \* \* \*." [Alabama & Chattanooga R. R. Co., 8 L. D. 33, 37 (1889); Alabama & Chattanooga R. R. Co., 16 L. D. 442, 444 (1893); Sioux City & St. Paul Railroad Co. v. United States, 159 U. S. 349, 365 (1895); *McCarver v. Herzberg*, 120 Ala. 523, 25 So. 3, 4 (1898).]

<sup>9</sup> The Joint Resolution of January 30, 1858, by the Alabama Legislature whereby the State conveyed title to the Wills Valley Railroad Company, the predecessor of the Alabama and Chattanooga Railroad Company, specifically provided in section 4 that nothing therein gave the grantee "any preference where its claims to lands come in conflict with the claims of any other road provided for in said act of Congress." Acts of General Assembly of Alabama (1857-1858), pp. 430, 431.

<sup>10</sup> 26 Stat. 496; 43 U. S. C. sec. 904; *United States v. Tennessee & Coosa Railroad Co.*, 176 U. S. 242, 254 (1900). By the forfeiture act, the unearned moiety vested in the United States and did not inure to the other conflicting railroad. *United States v. Southern Pacific Railroad Co.*, 146 U. S. 570 (1892); *Southern Pacific R. R. Co. v. United States*, 189 U. S. 447 (1903); *McCarver v. Herzberg*, 120 Ala. 523, 25 So. 3, 4 (1898).

<sup>11</sup> *United States v. Alabama State Land Co.*, 14 L. D. 129; 131 (1892); *Wallace v. Loomis*, 97 U. S. 146 (1877); *Knepper v. Sands*, 194 U. S. 476 (1904).

<sup>12</sup> In view of the fact that the United States owns an equal undivided moiety in this tract, Lord, of course, owns, at most, only the Alabama-Chattanooga moiety, not the "whole indefeasible and unconditional title of said S½NE¼," as expressed in the decree of May 2, 1940, which was based on the stated assumption that one of the ancestors in title, one Ragsdale, "was vested in fee simple of a good and lawful title to the whole interest in the S½NE¼." *Carr v. United States*, 98 U. S. 433 (1878).

<sup>13</sup> Martin's tenants were J. M. Culpepper and H. H. Robertson. Lord's suit was against J. M. Culpepper and "Herman Robinson." Martin was not a party to the suit.



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on a decree of July 21, 1943, by the circuit court of Etowah County, Alabama, dismissing Martin's bill of complaint against Lord to quiet title to the tract here involved.

Martin claims by adverse possession under claim or color of title. This claim or color of title rests on an assessment of taxes against the land here involved in the name of J. H. Ragsdale<sup>14</sup> and the tax sale of this tract to one G. A. Wendt on June 18, 1921, pursuant to a decree of the probate court; a tax deed by the probate judge of Etowah County, Alabama, to Wendt on May 1, 1925; the alleged vesting of Wendt's interest in Martin and her brothers after the decease of Wendt and his wife intestate; and a quitclaim to Martin from her brothers. Her asserted title by adverse possession is based on "open, adverse, sole, quiet, and peaceable possession of said property during the last past 20 years" through Wendt, Martin, and their tenants, and the alleged payment of taxes by Wendt and Martin on the tract here involved. Martin is not a settler on this land nor does she claim any interest in the lands under the settlement laws of the United States, within the second proviso of section 5 of the 1887 act.<sup>15</sup>

There are three main issues involved:

1. May a sale of the undivided interest of the United States be made to Lord under section 5 of the 1887 act?

2-3. May a sale of that interest be made to Martin either—

(a) under section 5 of the 1887 act, or

(b) under the Color of Title Act of 1928?

<sup>14</sup> Both Martin and Lord agree that the tract here involved was conveyed to J. H. Ragsdale by a warranty deed dated April 9, 1907. The abstract of title furnished by Lord shows the following additional transfers involving the tract here under consideration:

Grantor	Grantee	Interest	Instrument and date	Date filed
Ragsdale and wife.....	Samuel S. Lord...	Undivided half interest.	Warranty deed, May 19, 1908.	Jan. 1, 1909
Do.....	S. S. Lord.....	do.....	Mortgage, May 19, 1908.	Jan. 2, 1909
Samuel S. Lord and wife, Elizabeth Lord.	Frederick Stitzel..	do.....	do.....	May 17, —
Samuel S. Lord and wife...	George Mercke, Trustee.	do.....	Warranty deed, July 29, 1919.	Nov. 7, 1941

Suit by Lord group against ancestors in title—filed June 27, 1925. Decree in favor of Lord group rendered May 2, 1940.

<sup>15</sup> See footnote 2, *supra*. In any event, it has been held that the second proviso of section 5 is applicable only to settlers who settled after December 1, 1882, and before March 3, 1887. Chicago, St. Paul, Minneapolis and Omaha Ry. Co., 11 L. D. 607 (1890); Union Pacific Ry. Co. v. McKinley, 14 L. D. 237 (1892); Union Colony v. Fulmele, 16 L. D. 273 (1893); Swineford v. Piper, 19 L. D. 9 (1894); Yocom v. Keystone Lumber Co., 22 L. D. 558 (1896); Osborn v. Knight, 23 L. D. 216, 221 (1896); Miller v. Tacoma Land Co., 29 L. D. 633, 634 (1900); Gertgens v. O'Connor, 191 U. S. 237, 246 (1903).

## 1. SALE OF THE GOVERNMENT'S MOIETY TO LORD

In the Department's decision of January 15, 1946, holding that Lord was ineligible to purchase this interest under section 5 of the 1887 act, it was stated that the tract here involved was not listed in the schedules of lands attached to the deed of December 8, 1886, from Trustees Billups and Swann<sup>16</sup> to the Alabama State Land Company, one of the conveyances in the Lord group's chain of title. Lord has furnished, with her motion for rehearing, a corrected copy of this deed showing that the land here involved was included in schedule 1 thereof, the copy previously furnished having been erroneous. The Department's decision of January 15, 1946, was therefore in error on this fact.

This error with respect to the deed of Trustees Billups and Swann appears to have been the basis for a fundamental error in the Department's decision of January 15, 1946. The decision pointed out that neither the State of Alabama nor the trustees could dispose of the Coosa-Chattooga moiety and did not purport to do so, and that the 1900 deed of the Alabama State Land Company, purporting to convey the tract here involved, was a nullity as to the Coosa-Chattooga moiety because this moiety had been forfeited to the United States by the act of 1890. The conclusion was then reached that since Lord had not shown that the Coosa-Chattooga moiety was purchased while the legal title thereto was in the railroad or its successor in interest, Lord was not eligible to purchase it under the 1887 act.

However, it is immaterial, even though true, that the State of Alabama, trustee for the United States, could not, and did not, purport to dispose of the Coosa-Chattooga moiety or that the Alabama State Land Company's deed was a nullity as to the Coosa-Chattooga moiety which belonged to the United States. The material facts are that the deed did convey the Alabama-Chattanooga moiety and purported to cover the tract here involved. The very purpose of section 5 of the 1887 act was to afford to purchasers from a railroad, of lands within "the numbered sections prescribed in the grant \* \* \* where the lands so sold are for any reason excepted from the operation of the grant to said company," the opportunity to secure from the United States the legal title which the railroad did not have and could not convey.<sup>17</sup> The Department's decision of January 15, 1946,

<sup>16</sup> The State of Alabama acquired the Alabama-Chattanooga lands after the bankruptcy of that railroad and transferred the lands on February 8, 1877, to Billups and Swann. See *United States v. Alabama State Land Co.*, 14 L. D. 129, 131 (1892); *Wallace v. Loomis*, 97 U. S. 146 (1877).

<sup>17</sup> Opinion of Attorney General Garland, November 17, 1887, 19 Op. Atty. Gen. 68, 72; 5 L. D. 272, 275, quoted with approval in *United States v. Southern Pacific Railroad Co.*, 184 U. S. 49, 57 (1902).

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cited the case of *Ostrom v. Wood*, 140 Fed. 294 (C. C. N. D. Iowa, 1905), apparently for the conclusion that the place grant lands here involved were not subject to section 5 because they were not "excepted from the operation of the grant," within the meaning of section 5 of the 1887 act, merely because the railroad had failed to comply with the statutory condition that the railroad be constructed. The *Ostrom* decision, dealing with other railroads under another granting statute, can be applicable in this case only to the Coosa-Chattooga grant, and plainly is not applicable to the Alabama-Chattanooga grant. The latter railroad was constructed, but the land here involved, within the numbered sections prescribed in the Alabama-Chattanooga grant, was excepted from that grant, within the meaning of section 5 of the 1887 act, insofar as concerned the Coosa-Chattooga moiety in the land, thus rendering the latter moiety subject to purchase under section 5 by the owner of the Alabama-Chattanooga moiety.<sup>18</sup> Such application of section 5 of the 1887 act fulfills its purpose to protect the purchasers of railroad lands, within the numbered sections of a grant perfected by construction of the railroad, who did not acquire the full legal title to the land "where the lands so sold are for any reason excepted from the operation of the grant to said company."

To hold otherwise would, with respect to lands such as here involved (lands within conflicting grants where one line is constructed and the other is forfeited), result in the following situation: A purchaser of lands within the sections prescribed in a grant to a constructed railroad, but excepted from it as to a moiety in trust for another railroad having a conflicting grant, who by his purchase acquired the legal title to an undivided moiety in that land, would be denied the right to acquire the other moiety therein from the United States; while at the same time, pursuant to the plain mandate of section 5 of the 1887 act, a purchaser of land within the sections prescribed in, but *entirely* excepted from, the grant to a constructed railroad, who by his purchase acquired no legal title in that land, could acquire the full title therein from the United States. Section 5 of the 1887 act is not so limited, nor has that section heretofore been so construed by this Department. In numerous instances, on the applications under section 5, by owners of undivided moieties purchased from the constructed railroad, to purchase from the United States the undivided moiety not finally received by the other railroad to the lands in conflicting place grants under the same statute, this Department has held <sup>19</sup> that such purchase may be made under section 5 of the 1887

<sup>18</sup> The Alabama Company, Montgomery 011501, approved by First Assistant Secretary Finney on April 17, 1924.

<sup>19</sup> *Williams v. Elliott*, 30 L. D. 319, 321 (1900); 32 L. D. 113 (1903); The Alabama Company, Montgomery 011501, approved by First Assistant Secretary Finney on April 17, 1924; *Yocom v. Keystone Lumber Co.*, 22 L. D. 558 (1896).

act, and has issued patents under that section for the undivided moieties owned by the United States.<sup>20</sup> In fact, in the very section of land (sec. 35, T. 11 S., R. 6 E., Huntsville M., Alabama) in which lies the tract here involved, this Department has issued patents, for the undivided moiety of the United States within the conflicting place grants of the Alabama and Chattanooga Railroad Company and of the Coosa and Chattooga Railroad Company, to other applicants under section 5 of the 1887 act who were the owners of the Alabama-Chattanooga moiety.<sup>21</sup>

The Department's decision of January 15, 1946, is, therefore, erroneous insofar as it implies that, even if the Lord group were the undisputed owners of the Alabama-Chattanooga moiety, they would not be eligible, under section 5 of the 1887 act, to purchase the Coosa-Chattooga moiety from the United States.

But this does not mean that the Lord group has in this case yet established its eligibility to purchase this moiety. Section 5 of the 1887 act was for the benefit of a "bona fide purchaser, his heirs or assigns." Obviously, section 5 contemplated that the application to purchase thereunder would be by the person then holding the legal title. Certainly no one could plausibly argue that either an ancestral purchaser or an intermediate heir or assignee could apply under section 5 to purchase the land from the United States if he no longer held the apparent ownership of the land. In other words, section 5 may be utilized only by the existing owner of the apparent title. Hence, if Lord has lost the title to the Alabama-Chattanooga undivided moiety by Martin's adverse possession, Lord would not be the owner of the apparent title to the land and therefore could not, at least by an application under section 5 of the 1887 act, acquire a title to that land the interest in which Lord has lost to an adverse

<sup>20</sup> The Alabama Company, Montgomery 011501, Patent 939226 (May 29, 1924); The First National Bank in Gadsden, G. L. O. 08218, Patent 1113026 (February 9, 1942); Velma Taylor Jones, G. L. O. 07390, Patent 1101577 (March 2, 1939); Gadsden & Lookout Mountain Realty Company, G. L. O. 06906, Patent 1097051 (May 13, 1938); Etowah Abstract Company, G. L. O. 08217, Patent 1115043 (October 23, 1942); William F. Stowers, Montgomery 09226, Patent 488849 (September 1, 1915); Sloss-Sheffield Steel and Iron Company, G. L. O. 03515, Patent 1056411 (August 11, 1932); Edwin L. Goodhue, G. L. O. 02062, Patent 1029171 (July 9, 1929); Marion Franklin Wall, G. L. O. 07786, Patent 1107657 (April 10, 1940); Edwin L. Goodhue, G. L. O. 02245, Patent 1032760 (December 12, 1929); Mary A. Cranford, G. L. O. 06826, Patent 1094223 (December 2, 1937); Edith Mae Stocks, G. L. O. 08426, Patent 1114889 (October 12, 1942); Clada Chadwick Christopher and Ruby Chadwick, G. L. O. 08974, Patent 1116596 (April 7, 1943). See Memory T. Gray, Montgomery 011430, Patent 946856 (October 28, 1924). Also see, The Alabama State Land Company, Montgomery 010893, Patent 760785 (July 8, 1920).

<sup>21</sup> Marion Franklin Wall, G. L. O. 07786, Patent 1107657 (April 10, 1940); Edwin L. Goodhue, G. L. O. 02245, Patent 1032760 (December 12, 1929); Mary A. Cranford, G. L. O. 06826, Patent 1094223 (December 2, 1937); Edith Mae Stocks, G. L. O. 08426, Patent 1114889 (October 12, 1942); Clada Chadwick Christopher and Ruby Chadwick, G. L. O. 08974, Patent 1116596 (April 7, 1943).

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possessor. The question then is: Does Lord now own the Alabama-Chattanooga moiety?

The Department's decision of January 15, 1946, pointed out that Martin's claim creates a cloud on Lord's title and makes it doubtful whether Lord has any present interest in the Alabama-Chattanooga moiety. The Department's decision of January 15, 1946, further pointed out that the circuit court of Etowah County, in dismissing Martin's bill of complaint against the Lord group, did not adjudge that the title to the land was in Lord or that the Alabama-Chattanooga moiety was not owned by Martin. All the court held, apparently, was that Martin could not by adverse possession acquire the title to the land, since the United States, against whom there can be no adverse possession, owned an undivided moiety of the land. Lord has furnished no citation of authority to show that under the law of Alabama it is impossible to acquire title by adverse possession to a privately owned undivided moiety merely because the remaining undivided moiety is in the United States, where the United States, as in this case, not only has no objection to the adverse possession against the privately owned moiety, but also is willing to issue patent for its moiety to whoever is the owner of the privately owned moiety. Similarly, the Department's decision of January 15, 1946, also pointed out that the decree of the circuit court of Etowah County, dated February 16, 1942, in the common law ejectment suit by Lord against Martin's tenants, did not adjudge the right to possession as between Lord and Martin, Martin not being a party to that suit.

Lord's motion for rehearing indicates that the suit between Lord and Martin, on Lord's cross-bill, is still pending in the local courts. Accordingly, until Lord establishes, by a final adjudication in the local courts, that she and her four sisters are the true owners of the Alabama-Chattanooga moiety, they are not eligible under the 1887 act to purchase the Coosa-Chattooga moiety owned by the United States.

## 2. SALE OF THE GOVERNMENT'S MOIETY TO MARTIN UNDER SECTION 5 OF THE 1887 ACT

The Department's decision of January 15, 1946, held that Martin is ineligible to purchase the lands under section 5 of the 1887 act insofar as her asserted interest is based on a tax title.<sup>22</sup> It appears, however, that Martin is also claiming ownership of the Alabama-Chattanooga moiety by adverse possession under color of title for more than 20 years.<sup>23</sup> The Department's decision of January 15, 1946, did not

<sup>22</sup> See *Sullivan v. Van Kirk Land & Construction Co.*, 124 Ala. 225, 26 So. 925, 928 (1899).

<sup>23</sup> The period of adverse possession under the law of Alabama is 10 years. Code of Alabama (1940), Tit. 7, secs. 20, 828.

consider whether the holder of title by adverse possession to the Alabama-Chattanooga moiety might be eligible, under section 5 of the 1887 act, to purchase the Coosa-Chattooga moiety from the United States. It is plain, in such case, that those deriving record title from the original purchaser, who have lost their title in the Alabama-Chattanooga moiety to the adverse possessor, would therefore no longer have a right to purchase the Coosa-Chattooga moiety. It might, therefore, plausibly be argued that the person who has acquired the title to the Alabama-Chattanooga moiety also acquired the right to purchase the Coosa-Chattooga moiety under section 5 of the 1887 act. But it is at present unnecessary in this case to consider whether such adverse possessor is a "bona fide purchaser, his heirs or assigns," within the meaning of the 1887 act. Martin, the claimant by adverse possession, has not yet shown that she has title to the Alabama-Chattanooga undivided moiety. Both Lord and Martin are asserting conflicting claims to that undivided moiety, and the suit between the parties on this question has not been finally decided but is still pending in the Alabama courts. Accordingly, Martin is in any event not yet eligible to purchase the Coosa-Chattooga moiety under the 1887 act. If and when Martin finally secures a final adjudication that she is the owner of the Alabama-Chattanooga moiety by adverse possession, the Department will then undertake to consider whether Martin, as such owner, is an eligible purchaser of the Coosa-Chattooga moiety under section 5 of the 1887 act.<sup>24</sup> Of course, if Martin purchases the Alabama-Chattanooga moiety by deed from Lord, Martin would be eligible to purchase the Coosa-Chattooga moiety from the United States under section 5.

### 3. SALE OF THE GOVERNMENT'S MOIETY TO MARTIN UNDER THE COLOR OF TITLE ACT OF DECEMBER 22, 1928

The Color of Title Act expressly provides:

\* \* \* That no patent shall issue under the provisions of this Act for any tract to which there is a conflicting claim adverse to that of the applicant, unless and until such claim shall have been finally adjudicated in favor of such applicant.

As already mentioned, Lord's claim to the tract here involved is still pending in the State court. That claim is "a conflicting claim adverse to that of" Martin, and it has not "been finally adjudicated in favor of" Martin. Irrespective, therefore, of whether or not the evidence of adverse possession submitted by Martin to this Department would, in

<sup>24</sup> Cf. Sloss-Sheffield Steel and Iron Company, G. L. O. 03515, General Land Office letter June 16, 1932.

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an uncontested proceeding, be deemed sufficient by this Department to grant a patent under the Color of Title Act, no patent may be granted under the Color of Title Act so long as Lord's adverse claim has not "been finally adjudicated in favor of" Martin.

The entire case here is one involving a dispute between Lord and Martin. Insofar as the United States is concerned, this Department is willing to issue a patent to whoever is the legal owner of the Alabama-Chattanooga undivided moiety in the lands here involved. Under such circumstances, this Department is not the appropriate forum in which to settle the disputed question as to who is the owner of the Alabama-Chattanooga moiety. Such dispute should be settled in the local courts.

The motion for rehearing is granted. Rule 83 of the Rules of Practice (43 Code of Federal Regulations 221.81) provides that if grounds for rehearing are shown and a rehearing granted, the moving party must, within 15 days, serve a copy of his motion, together with all argument in support thereof, on the opposite party, who will be allowed 30 days thereafter in which to file and serve answer, brief, and argument. In this case, however, pursuant to the request of the Department, Lord has already made such service. Martin has not filed or served any answer, brief, or argument; of course, she was not required to do so under Rule 83. Accordingly, Martin is allowed 30 days in which, if she desires, to serve and file any answer, brief, and argument. If she does not, or if her showing is inadequate to change any conclusions arrived at in this decision, the case will then be transmitted to the Bureau of Land Management to take the following action: (a) To suspend action on the applications of both Lord and Martin until such time as the courts of Alabama have finally adjudicated the question as to who is the owner of the Alabama-Chattanooga moiety in the tract here involved; (b) if the Alabama courts hold that Lord owns the Alabama-Chattanooga moiety and that Martin's asserted claim of title thereto is void, Lord's application may, if all else be regular, proceed to patent under section 5 of the 1887 act, and Martin's applications will be rejected; (c) if Martin's claim to ownership of the Alabama-Chattanooga moiety by adverse possession is upheld in the local courts, consideration will then be given to the questions whether her applications to purchase the interest of the United States in the Coosa-Chattooga moiety may proceed to patent either under section 5 of the 1887 act or under the Color of Title Act, and Lord's application will be rejected.

WARNER W. GARDNER,  
*Assistant Secretary.*

## UNITED STATES v. FRANK J. MILLER

A-24352

*Decided February 24, 1947***Mining Laws—Discovery as Prerequisite to Validity of Mining Claims—  
Authority of Department to Determine Mining Claim Invalid for Lack  
of Discovery.**

Since only "valuable mineral deposits" may be located under the mining laws of the United States, no mining claim is valid until there has been a discovery of minerals, within the limits of the claim, which would justify a person of ordinary prudence in the further expenditure of time and money with reasonable prospect of success in developing a profitable mine. Such discovery means more than the showing only of isolated bits of mineral or geologic inferences or mere indications or belief as to the existence of mineral. This Department has full authority to determine that a claim is invalid for lack of discovery.

**Concurring Decisions of Subordinate Adjudicating Officials on Questions of  
Fact.**

The concurring decisions of the register (now manager) of the local land office and the Commissioner of the General Land Office (now Director of the Bureau of Land Management) on questions of fact are generally not disturbed on appeal to the Secretary unless clearly wrong.

**APPEAL FROM THE GENERAL LAND OFFICE<sup>1</sup>**

On May 20, 1942, Frank J. Miller filed application for mineral patent (Billings 038594, Mineral Survey 10774) for the following mining claims which are within the Absaroka (now Gallatin) National Forest, Montana:

**Lode Mining Claims:**

Last Chance.

Discovery.

Daisy.

Louise.

Red Bird.

Trilby.

Stranger.

**Placer Mining Claims:**

Jumbo.

Dorothy Mae.

On July 26, 1944, the Regional Forester, Region 1, Forest Service, United States Department of Agriculture, protested and filed a contest against all of the above-listed claims except the Discovery and the Last Chance lode claims.<sup>2</sup>

<sup>1</sup> Effective July 16, 1946, the General Land Office and the Grazing Service were abolished and their functions were transferred to the Bureau of Land Management, by Reorganization Plan No. 3 of 1946 (11 F. R. 7875, 7876; 7776).

<sup>2</sup> The protest was filed under paragraph 6 of the Joint Regulations of August 5, 1915, of the Secretaries of the Interior and of Agriculture, 44 L. D. 360, 362; 43 CFR 205.6 (Circ. No. 435, September 4, 1915).



*February 24, 1947*

The protest was based on the following charges:

1. That no discovery of a vein or lode of rock in place carrying valuable mineral deposits has been made upon the Daisy, Louise, Red Bird, Trilby, and Stranger lode mining claims.

2. That no discovery of placer gold or other valuable mineral deposits has been made upon the Jumbo and Dorothy Mae placer mining claims.

Miller filed an answer denying the charges and a hearing was held on December 14, 1944. Both parties were represented by counsel, witnesses appeared for both parties, the defendant was present and testified, and briefs were filed. Miller's brief before the register admitted that no adequate discovery had yet been made upon the Stranger, Red Bird, and Louise lode mining claims. The register's opinion of January 27, 1945, exhaustively reviewed the evidence and concluded that there had been no valid discovery of mineral on any of the claims against which the protest had been filed, and he recommended that the claims be declared null and void and that Miller's mineral application be canceled as to these claims. Miller appealed the register's decision to the Commissioner of the General Land Office. The Commissioner's decision of March 19, 1946, again exhaustively reviewed the evidence, found the decision of the register to be correct and affirmed that decision.

Miller has filed an appeal (A-24352) to the Secretary from the decision of the Commissioner. He urges that the Commissioner and the register erred in finding the evidence sufficient to show lack of valid discovery upon the protested claims and he contends that the preponderance of the evidence showed a sufficient discovery of valuable mineral deposits upon the claims. He therefore argues that his application should not have been partially canceled and that the protested claims should not be declared null and void.

Although the concurring decisions of the register of the local land office and the Commissioner of the General Land Office, on questions of fact, are generally not disturbed unless clearly wrong,<sup>3</sup> the extensive testimony and evidence in this case have again been carefully examined. The decisions of the register and the Commissioner have adequately and in detail summarized the evidence. Although the general area (within the Sheep Eater unorganized mining district in Park County, Montana) appears to be mineralized, the evidence quite clearly indicates that there has been no mineral discovery on the pro-

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<sup>3</sup> *United States v. John E. Stevenson*, A. 22968 (Sacramento 031054), May 13, 1942; *Coffin v. Inderstrod*, 16 L. D. 382, 383 (1893); *Morley v. Barrows*, 4 L. D. 135, 136 (1885); see *Johns v. Marsh*, 15 L. D. 196 (1892); *McKinnis v. State of Oregon*, 11 L. D. 618 (1890); *Silveria v. Paugh*, 19 L. D. 108 (1894).

tested mining claims which would be sufficient to comply with the requirements of the mining law.

Under the mineral laws of the United States,<sup>4</sup> only "valuable mineral deposits" may be located. In order for the location to be valid, there must be a discovery of mineral within the limits of the claim located and the discovery must be such as would justify a person of ordinary prudence in the further expenditure of time and money with reasonable prospect of success in developing a profitable mine.<sup>5</sup> Neither the discovery of an isolated bit of mineral not connected with or leading to substantial prospective values nor geologic inference as to what might be discovered at greater depths constitutes sufficient discovery.<sup>6</sup> No lode mining claim can be located and no patent issued until actual discovery of a vein or lode within the limits of the claim as located, and mere indications or belief in the existence of mineral on the claim do not amount to a discovery.<sup>7</sup> The statutory requirement of a "discovery" of the mineral cannot be satisfied by mere indications, however strong, of the existence of the mineral.<sup>8</sup> And there is, of course, now no question that this Department has authority to determine that a claim is invalid for lack of discovery.<sup>9</sup> The evidence in this case has indicated, on each of the three reviews, that there has been no valid discovery on any of the claims here involved which would sufficiently comply with the requirements of the mining law. These claims are invalid for want of adequate discovery.

The decision appealed from is affirmed.

WARNER W. GARDNER,  
*Assistant Secretary.*

<sup>4</sup> Rev. Stat. secs. 2329, 2318, 2319; 30 U. S. C. secs. 35, 21, 22.

<sup>5</sup> *Cameron v. United States*, 252 U. S. 450, 459 (1920); *Chrisman v. Miller*, 197 U. S. 813, 322 (1905); *Jefferson-Montana Copper Mines Co.*, 41 L. D. 320 (1912); *Cataract Gold Mining Co.*, 43 L. D. 248, 254 (1914).

<sup>6</sup> Rev. Stat. secs. 2320 and 2329; 30 U. S. C. secs. 23 and 35; *Castle v. Womble*, 19 L. D. 455, 457 (1894); *East Tintic Consolidated Mining Co.*, 40 L. D. 271 (1911), and 41 L. D. 255 (1912); *Chrisman v. Miller*, 197 U. S. 313, 321-323 (1905); *Waskey v. Hammer*, 223 U. S. 85, 90-91 (1912); 2 *Lindley on Mines* (3d ed., 1914), sec. 336; *Oregon Basin Oil and Gas Co.*, 50 L. D. 244 (1923); *United States v. Rutledge*, A. 24345 (Billings 1909826), August 12, 1946.

<sup>7</sup> *United States v. Arizona Manganese Corp.*, 57 I. D. 558 (1942); *United States v. Joe Larson*, A. 22982, June 30, 1941.

<sup>8</sup> *Nevada Sierra Oil Co. v. Home Oil Co.*, 98 Fed. 673, 675 (C. C. Calif., 1899); 2 *Lindley on Mines* (3d ed., 1914), secs. 336 and 437.

<sup>9</sup> *Ikles v. Virginia-Colorado Development Corp.*, 295 U. S. 639, 645 (1935); *Cameron v. United States*, 252 U. S. 450, 460, 464 (1920).

## LEGAL STATUS OF THE SOUTHWESTERN POWER ADMINISTRATION

### Southwestern Power Administration—Establishment—Appropriations Authorized by Law.

The establishment of Southwestern Power Administration by the Secretary of the Interior to perform functions under section 5 of the Flood Control Act of December 22, 1944 (58 Stat. 887, 890; 16 U. S. C. sec. 825s), was authorized by section 161, Revised Statutes (5 U. S. C. sec. 22).

Appropriations to the Southwestern Power Administration are authorized by law.

M-34873

FEBRUARY 28, 1947.

TO THE DIRECTOR, DIVISION OF BUDGET AND ADMINISTRATIVE  
MANAGEMENT.

The following information is submitted in response to your memorandum of February 11, regarding the legal status of the Southwestern Power Administration:

The Southwestern Power Administration was originally created by the Secretary of the Interior on September 1, 1943 (Departmental Order No. 1865), for the purpose of carrying out wartime responsibilities vested in him by Executive Orders Nos. 9366 (8 F. R. 10699) and 9373 (8 F. R. 12001). These responsibilities included, among other things, the marketing of electric power and energy from the Denison Dam project and Norfolk Dam project, both constructed and operated by the United States through the Corps of Engineers of the War Department.

In the absence of legislation, the functions under Executive Orders 9366 and 9373 which the Secretary of the Interior has performed through the Southwestern Power Administration would terminate not later than 6 months after the end of the war (which date has not yet been fixed). However, the Congress, by section 5 of the Flood Control Act of December 22, 1944 (58 Stat. 887, 890; 16 U. S. C. sec. 825s), vested in the Secretary of the Interior permanent responsibility for the transmission and disposition of surplus electric power energy generated at all reservoir projects under the control of the War Department. In pursuance of section 5, the Secretary of the Interior reestablished the Southwestern Power Administration as the administrative unit, under his supervision and direction, for the marketing of surplus power and energy from the Norfolk and Denison projects and from all other reservoir projects constructed by the War Department in the area comprised of the States of Arkansas and Louisiana, of that part of the States of Kansas and Missouri lying south of the Missouri River Basin and east of the 98th meridian,

and of that part of the States of Texas and Oklahoma lying east of the 99th meridian and north of the San Antonio River Basin (Departmental Order No. 2135, dated November 21, 1945; 10 F. R. 14527).

The reestablishment of the Southwestern Power Administration to carry out in the southwestern area the functions vested in the Secretary of the Interior by section 5 of the Flood Control Act of 1944 seems clearly to be within the general authority of the Secretary to determine, and to make appropriate provisions concerning, the manner in which the business of the Department shall be distributed and performed (Rev. Stat. sec. 161; 5 U. S. C. sec. 22). The Southwestern Power Administration is merely the name used by the Secretary of the Interior to designate a group of officials and employees of the Department to whom the Secretary has assigned work under section 5.

In the testimony of the witnesses before the congressional committees on the bill (H. R. 4485, 78th Cong.) which later became the Flood Control Act of 1944, in the comments of members of the committees, and in the debates in the House and Senate, there are numerous indications of a clear understanding that the Secretary of the Interior would exercise the functions conferred by section 5 in the same manner as he was performing similar functions through the Bonneville Power Administration, at Fort Peck through the Bureau of Reclamation, and in the Southwest through the Southwestern Power Administration under Executive orders. See, for example, the statement of Representative Whittington, who was in charge of the Conference Report on the bill on the floor of the House (90 Cong. Rec. 9281) :

\* \* \* The conference agreement provides for the disposal by the Secretary of the Interior of the surplus power generated at the projects under the control of the War Department in substantially the same language which now obtains in legislation previously passed by the Congress for the disposal of power at Bonneville, at Fort Peck, and under Executive orders for the disposal of power in the Southwest at the reservoirs at Denison, Pensacola, and Norfolk, with amendments to the language as agreed to in the conference to the Senate amendment. \* \* \*

All funds requested in the 1948 budget estimate for the Southwestern Power Administration are needed, and, if appropriated, will be used for the purpose of making possible the performance of permanent functions vested in the Secretary of the Interior by section 5 of the Flood Control Act of December 22, 1944. Hence, such an appropriation can properly be considered as authorized by law.

\* \* \* \* \*

MASTIN G. WHITE,  
*Solicitor.*

## STATE OF CALIFORNIA

A-24326

*Decided March 6, 1947***School-Land Indemnity Selections—Classification Under Section 7 of Taylor Grazing Act, as Amended.**

While section 2275 of the Revised Statutes, as amended February 28, 1891 (26 Stat. 796; 43 U. S. C. sec. 851), granted a right to the States to make indemnity selection for certain deficiencies in the school-land grants, a State is not entitled to particular land selected unless the Secretary "in his discretion" has previously classified the land under section 7 of the Taylor Grazing Act, as amended (48 Stat. 1272; 49 Stat. 1976; 43 U. S. C. sec. 315f), as proper for selection.

**Timberland—Classification as Proper for Selection.**

It is reasonable not to classify, as proper for indemnity selection, lands which are very valuable timberland and which may also serve the purposes of watershed protection.

**APPEAL FROM THE GENERAL LAND OFFICE<sup>1</sup>**

The State of California has appealed from a decision of the General Land Office which rejected its school-land indemnity selection, Sacramento 034186, under section 7 of the Taylor Grazing Act, as amended (act of June 28, 1934, as amended, 48 Stat. 1272, 49 Stat. 1976; 43 U. S. C. sec. 315f), for lots 1, 2, 7, 8, 9, 10, 15, 16, SE $\frac{1}{4}$  sec. 2, T. 29 N., R. 2 E., M. D. M. The Land Office stated that disposition of the lands applied for would be contrary to the conservation and development of natural resources, and to the general public interests; that the lands are valuable for future timber production and watershed protection, and are not suitable for classification as indemnity for losses in school sections in place.

In its appeal, the State urges that it is authorized to select, as indemnity for losses it sustained in the original grants, a like area of nonmineral lands, and that the only limitation is that the selected lands must not be mineral in character. The State asserts that there was never any claim in this case that the selected lands are mineral in character or fall within any of the other prohibited classes enumerated in the granting acts. It contends that the denial of the indemnity selection amounts to an executive destruction, by indirection, of the State's rights under its school-land grant. The State also claims that the policy reflected in the Commissioner's decision is detrimental to the welfare of the Western States, and that any policy perpetually prohibiting acquisition of public lands by the citizen would be con-

<sup>1</sup> Effective July 16, 1946, the General Land Office and the Grazing Service were abolished and their functions were transferred to the Bureau of Land Management, by Reorganization Plan No. 3 of 1946 (11 F. R. 7875, 7876; 7776).

trary to the expressed purpose of the Taylor Grazing Act "to promote the highest use of the public lands *pending its final disposal*." Finally, it is the State's assertion that the general public interest would be served by passing the land in question to private ownership, namely, to the vendee of the State, an experienced forester, rather than by withholding the land's disposal and establishing a special Federal governmental unit to develop it.

Section 2275 of the Revised Statutes, as amended on February 28, 1891 (26 Stat. 796; 43 U. S. C. sec. 851), granted the right to the States to make indemnity selection for certain deficiencies in the school-land grants. However, the State is not justified in its apparent assertion that as a result the State is entitled, as a matter of right, to the particular land selected, as long as it does not fall within any of the prohibitory clauses of the granting act. Under section 7 of the Taylor Grazing Act, *supra*, the Secretary must exercise "in his discretion" his power of classification before the lands can be patented to the State. Section 7 provides, in part, as follows:

\* \* \* the Secretary of the Interior is hereby authorized, *in his discretion*, to examine and classify any lands withdrawn or reserved by Executive order of November 26, 1934 (numbered 6910), and amendments thereto, and Executive order of February 5, 1935 (numbered 6964), or within a grazing district, which are \* \* \* proper for acquisition in satisfaction of any outstanding lieu, exchange or script rights or land grant, and to open such lands to entry, selection, or location for disposal in accordance with such classification under applicable public-land laws \* \* \*. *Such lands shall not be subject to disposition, settlement, or occupation until after the same have been classified and opened to entry: \* \* \*. [Italics supplied.]*

In fact, by filing a petition for classification under section 7, the State recognized the necessity of such prior classification.

The selected lands are very valuable timberland. They can properly be used as a means of assuring the future timber production and thereby promoting the stability of the forest industry. They may also serve the purposes of watershed protection. Under these circumstances, it is reasonable and in accord with general congressional policy not to classify the lands as proper for indemnity selection.<sup>2</sup>

Of course, the Department has no policy of "perpetually prohibiting acquisition of public lands by the citizen." The action taken in the present case is fully in accord with the Taylor Grazing Act, and is in

<sup>2</sup> See act of March 29, 1944 (58 Stat. 132; 16 U. S. C. sec. 583), on the establishment of cooperative sustained-yield units. That act indicates a clear expression of policy on the part of Congress as to a use of valuable timberlands which it deems desirable. Cf. *J. A. Allison et al.*, 58 I. D. 227, 235 (1942; 1943), setting forth the broad policy basis for classifications under section 7 of the Taylor Grazing Act, and explaining that a departmental refusal to classify valuable timberlands as "proper" for disposal under section 7, was in accordance with the development of a general conservation program; *Nelson A. Gerttula*, A-22716, July 12, 1941 (unreported); *J. C. Aldrich*, A-24041 (motion for exercise of supervisory authority denied), February 26, 1947 (unreported).

March 18, 1947

no way inconsistent with its purposes. The provision of section 1 of that act, quoted by the State, stating the purpose, "to promote the highest use of the public lands *pending its final disposal*," merely refers to the Secretary's authority to establish grazing districts.

The decision of the General Land Office is affirmed.

WARNER W. GARDNER,  
*Assistant Secretary.*

## MARKETING OF ELECTRIC POWER FROM RECLAMATION PROJECTS IN ARKANSAS

### Power of Secretary to Delegate Functions—Bureau of Reclamation— Southwestern Power Administration—Marketing of Electric Power.

The functions under the reclamation laws, including the function of marketing electric power generated at reclamation projects, are vested in the Secretary of the Interior.

Under section 161 of the Revised Statutes, the Secretary possesses broad discretionary authority to determine the extent to which his functions in connection with the marketing of electric power from reclamation projects shall be delegated and in selecting the officials or agencies of the Department to whom or to which the delegation shall be made.

Under section 161 of the Revised Statutes, the head of a Department can, without specific congressional authorization, delegate to subordinate officials of the Department many functions which require the exercise of judgment or discretion.

The discretionary authority of the Secretary to delegate the function of marketing electric power from reclamation projects is not affected by the act of May 26, 1926, defining the scope of the position of the Commissioner of Reclamation, or by the act of December 19, 1941, expressly authorizing the Secretary to delegate his powers and duties under the reclamation laws to specified officials of the Bureau of Reclamation.

If the Congress should extend the provisions of the reclamation laws to the State of Arkansas, and the Department should subsequently construct in Arkansas multiple-purpose projects under such laws, the Secretary of the Interior could properly assign to the Southwestern Power Administration the function of marketing any surplus electric power from such projects.

M-34893

MARCH 18, 1947.

### TO THE SECRETARY.

This responds to an informal request for my opinion upon the question as to whether, if the Congress should extend the provisions of the reclamation laws to the State of Arkansas (as proposed in H. R. 1274 and S. 299, 80th Cong.), and the Department should subsequently construct in Arkansas under such laws multiple-purpose projects providing, among other things, electric power for distribution outside

the projects, the Secretary of the Interior could properly assign to the Southwestern Power Administration the function of marketing such power.

The functions under the reclamation laws are vested in the Secretary of the Interior. For example, it is the Secretary of the Interior to whom Congress has given the authority to make surveys and investigations with respect to prospective reclamation projects (43 U. S. C. secs. 411, 485h (a)); to acquire the property rights that are needed in connection with the establishment of projects (43 U. S. C. sec. 421); to enter into contracts for the construction of projects (43 U. S. C. sec. 419); to maintain the works after their construction (43 U. S. C. sec. 491); to classify the lands within projects (43 U. S. C. secs. 462 and 485g); to prescribe the essential qualifications which must be possessed by applicants for entry to public lands on projects (43 U. S. C. sec. 433); to make contracts for the distribution of water for irrigation purposes (43 U. S. C. secs. 511, 485c, 485h (d), (e)); to sell water for purposes other than irrigation (43 U. S. C. secs. 521 and 485h (c)); and "to perform any and all acts \* \* \* necessary and proper for the purpose of carrying out the provisions of" the reclamation laws (43 U. S. C. secs. 373, 485i).

In particular, it is the Secretary of the Interior who is authorized by Congress to sell or lease any surplus electric power or power privileges at reclamation projects (43 U. S. C. secs. 522 and 485h (c)). Of course, Congress did not intend that the Secretary should personally conduct the program of marketing the electric power generated at reclamation projects. As the Attorney General stated in 39 Op. Atty. Gen. 541, 546—

The theory underlying the vesting in an executive officer of numerous duties, varying in importance, is not that he will personally perform all of them, but rather that he will see to it that they are performed, the responsibility being his and he being chargeable with the result. \* \* \*

In recognition of this, Congress in section 161 of the Revised Statutes (5 U. S. C. sec. 22) has authorized the head of each Department to provide for "the distribution and performance of its business." Accordingly, the Secretary of the Interior possesses broad discretionary authority to determine the extent to which his functions in connection with the marketing of electric power from reclamation projects shall be delegated, and in selecting the official or officials of the Department to whom, or the agency or agencies of the Department to which, the delegation shall be made. (See 37 Op. Atty. Gen. 364, 367; and Solicitor's opinion M. 33549, March 21, 1944.)

It might be argued that the act of May 26, 1926 (44 Stat. 657; 43 U. S. C. sec. 373a), and the act of December 19, 1941 (55 Stat. 842;



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16 U. S. C. sec. 590z-11), restrict the Secretary's authority to delegate in such a way as to require that any delegation of the Secretary's functions in connection with the marketing of electric power from reclamation projects shall be made to officials of the Bureau of Reclamation. The first of these statutes provides:

That under the supervision and direction of the Secretary of the Interior, the reclamation of arid lands, under the Act of June 17, 1902, and Acts amendatory thereof and supplementary thereto, shall be administered by a Commissioner of Reclamation, who shall receive a salary of \$10,000 per annum, and who shall be appointed by the President.

An examination of the legislative history of this statute (see H. Rept. 549 and S. Rept. 51, 69th Cong.) reveals that its purpose was merely to furnish a statutory basis for the payment to the Commissioner of a higher salary than was possible under the provisions of the Classification Act of 1923. It will be noted that Congress, in defining the duties of the Commissioner of Reclamation, merely provided that "the reclamation of arid lands" under the reclamation laws should be administered by the Commissioner. Congress did not say that the Commissioner should administer the reclamation laws, or use general language indicating that all activities under those laws should be administered by him. Thus, although the act of May 26, 1926, would constitute a bar if the Secretary of the Interior should wish to delegate his functions in connection with "the reclamation of arid lands" to an agency or an agency official outside the Bureau of Reclamation, this statute does not limit the discretionary authority of the Secretary with respect to the delegation of his functions in connection with the marketing of electric power generated at reclamation projects.

The act of December 19, 1941, creates a more difficult problem from the standpoint of this discussion. It provides:

That for the purpose of facilitating and simplifying the administration of the Federal reclamation laws (Act of June 17, 1902, 32 Stat. 388 and Acts amendatory thereof or supplementary thereto) and the Act of August 11, 1939 (53 Stat. 1418), as amended, the Secretary of the Interior is hereby authorized to delegate, from time to time and to the extent and under such regulations as he deems proper, his powers and duties under said laws to the Commissioner of Reclamation, an Assistant Commissioner, or the officer in charge of any office, division, district, or project of the Bureau of Reclamation.

It could be urged that, as this statute specifically authorizes the Secretary of the Interior to delegate his functions under the reclamation laws to specified officials of the Bureau of Reclamation, it by implication prohibits the Secretary from delegating any of his functions under the reclamation laws to officials of other agencies of the Depart-

ment. However, I have come to a contrary conclusion with respect to this point.

It appears that the act of December 19, 1941, was enacted by the Congress at the request of the Secretary of the Interior. It also appears that the Secretary of the Interior, in requesting the enactment of this legislation, was acting under the mistaken belief that he could not legally delegate any of his functions under the reclamation laws "requiring the exercise of discretion" unless Congress specifically authorized such delegation (see S. Rept. 842 and H. Rept. 751, 77th Cong.). The fallacy of the theory that the head of an executive department of the Government cannot, without express congressional authorization, delegate to subordinate officials functions requiring the exercise of judgment or discretion has been pointed out by the Attorney General (35 Op. Atty. Gen. 15, 19; 39 Op. Atty. Gen. 541) and by prior Solicitors of this Department (see Solicitor Gardner's memorandum dated August 26, 1943, 58 I. D. 499, to the Assistant Secretary regarding the delegation of powers pertaining to Indian Affairs, and Solicitor Harper's opinion, M. 33359, dated October 13, 1943). Any such limitation on the power to delegate would so hamper the operations of the Government as to make the Government ineffective in a time of vast and far-flung governmental activities. However, it seems to be generally agreed that the power to delegate is not unlimited, although it is uncertain as to just where the dividing line lies between delegable authority and nondelegable authority. As an example of nondelegable authority, the Attorney General has said (35 Op. Atty. Gen. 15, 21) that the authority of the head of a Department to make regulations which have the force of law, which are binding on members of the public, and which are enforceable in the courts cannot, without specific congressional authorization, be delegated to subordinate officials of the Department. Without attempting to make a detailed analysis of the powers of the Secretary of the Interior under the reclamation laws, it may be assumed that some of these powers are of such a nature that, prior to the passage of the act of December 19, 1941, they could not have been delegated by the Secretary of the Interior to any of the subordinate officials of the Department under the general language of section 161 of the Revised Statutes, mentioned in the third paragraph of this memorandum. Thus, the action of the Secretary in requesting the passage of the act of December 19, 1941, must be regarded as an effort to obtain specific authority to delegate to officials of the Bureau of Reclamation those functions, if any, under the reclamation laws which could not otherwise be delegated to subordinate officials of the Department.

The function of marketing surplus electric power generated at

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reclamation projects is not one which, prior to the passage of the act of December 19, 1941, the Secretary of the Interior had to perform in person because it was nondelegable under the provisions of section 161 of the Revised Statutes. On the contrary, that function was clearly delegable prior to December 19, 1941, in accordance with the principles discussed by the Attorney General and Solicitors Gardner and Harper in the opinions previously cited. Consequently, as no specific congressional authorization to delegate the function of marketing power from reclamation projects was required, I conclude that the act of December 19, 1941, was not intended to, and did not, affect in any way the authority of the Secretary to delegate this function.

The legal status of the Southwestern Power Administration is indicated in Solicitor's opinion dated February 28, 1947, 59 I. D. 449. That agency is maintained within the Department to market, under a delegation of authority from the Secretary of the Interior, surplus electric power generated at flood control projects in the Southwest under the control of the War Department. The statutory authority of the Secretary of the Interior with respect to the marketing of electric power from these flood control projects (section 5 of the Flood Control Act of 1944, 58 Stat. 887, 890; 16 U. S. C. sec. 825s) is similar in nature to the authority of the Secretary with respect to the marketing of electric power from reclamation projects, although the respective statutes vary as to the details of the power-marketing programs. There is no distinction, in my judgment, between the authority of the Secretary of the Interior to delegate to the Southwestern Power Administration the function of marketing electric power from flood control projects of the War Department in the Southwest, on the one hand, and the function of marketing electric power from any reclamation projects that may be established in the same area, on the other hand.

Therefore, for the reasons indicated above, it is my opinion that if the Congress should extend the provisions of the reclamation laws to the State of Arkansas, and the Department should subsequently construct in Arkansas multiple-purpose projects under such laws, the Secretary of the Interior could properly assign to the Southwestern Power Administration the function of marketing any surplus electric power from such projects.

Of course, the conclusion stated above would be affected by any restrictive language that might subsequently be inserted by Congress in special statutory provisions (including items in appropriations acts) relating to particular reclamation projects in Arkansas.

MASTIN G. WHITE,  
*Solicitor.*

JOSEPH A. LEMAN  
LARRY M. OSKOLKOFF

A-24493

*Decided March 21, 1947*

**Homestead Entry—Issuance of Patent—Statute of Limitations.**

Two years from the date of the issuance of the register's receipt upon the final entry of any tract of land under the homestead laws, the entryman is entitled to receive a patent without regard to whether a final certificate has been issued. The running of the 2-year period may be tolled, however, if within that time the entryman has received notice of a protest and appeared to seek its dismissal, even though the trial of the protest is not commenced within the 2-year period.

**APPEAL FROM THE BUREAU OF LAND MANAGEMENT**

On November 14, 1938, the application of Joseph A. Leman to make homestead entry on lot 2 (48.95 acres) and lot 1 (35.63 acres), sec. 34, T. 1 S., R. 14 W., Seward Meridian, Alaska, under the act of May 14, 1898, as amended (30 Stat. 409; 32 Stat. 1028; 48 U. S. C. sec. 371), was allowed. In 1942, pursuant to section 2291, Revised Statutes (43 U. S. C. sec. 164), he filed an application for reduction of the required area of cultivation which was allowed on February 1, 1945. At about the same time Leman also submitted his final proof, but an investigation disclosed that most of his improvements were placed on lot 2, sec. 27, and that lot 2, sec. 34, is largely occupied by settlers and subject to a withdrawal dated March 28, 1940, for an air-navigation site. Because it appeared that Leman intended to include lot 2, sec. 27, in his original entry and because many of his improvements were placed thereon, he was permitted by a decision of the General Land Office,<sup>1</sup> dated February 1, 1945, to amend his entry by substituting lot 2, sec. 27, for lot 2, sec. 34. And although Leman had received a final receipt from the register dated March 10, 1943, it was stated in the same decision that there was a deficiency of 35 cents in his payment for final commissions and fees.

But the same Land Office decision noted that lot 1, sec. 34, included a cabin and gardens belonging to Larry M. Oskolkoff who claimed long residence on lot 1 for himself and his family. The decision stated that a final certificate would not issue until disposition had been made of the conflicting settlement rights of Oskolkoff, and he was required to file, within 60 days of receipt of a copy of the decision, an affidavit setting forth the material facts of his settlement or have his claim considered waived. A registered mail return re-

<sup>1</sup> Effective July 16, 1946, the General Land Office and the Grazing Service were abolished and their functions were transferred to the Bureau of Land Management, by Reorganization Plan No. 3 of 1946 (11 F. R. 7875, 7876; 7776).

*March 21, 1947*

ceipt shows that service of this decision was made on Oskolkoff on March 14, 1945.

Thereafter, Leman published five times between May 2 and May 31, 1945, notice of his final proof on the amended entry (43 CFR 65.25). This notice allowed 30 days within which any person might file a protest against acceptance of the final proof and issuance of a final certificate.

On June 27, 1945, subsequent to the 60-day period specified in the decision of February 1, 1945, but within the 30-day period set forth in Leman's published notice of final proof on the amended entry, Oskolkoff filed his formal protest against the patenting of lot 1, sec. 34, to Leman.

In a decision issued August 28, 1945, the General Land Office, among other matters, stated that the showing made by Oskolkoff appeared to entitle him to equitable relief and that Leman seemed to have no objection thereto. Consequently, Leman was allowed 30 days to show cause why he and his wife should not execute a deed to Oskolkoff to be deposited in escrow pending issuance of a patent. Leman responded with a long letter received November 14, 1945, indicating that he was unwilling to grant as much land as Oskolkoff desired because Leman's egress road passed within 80 feet of Oskolkoff's house but that he would "make a deed \* \* \* guaranteeing not to exclude him from his home." This was followed on April 24, 1946, by another decision allowing the parties 60 days within which to make whatever type of agreement would be mutually satisfactory.

Oskolkoff replied by letter dated June 21, 1946, in which he stated that he and Leman were unable to arrive at an agreement. He further asserted that he and his family before him had lived on lot 1, sec. 34, for 45 years, that his house, shed, and gardens are on lot 1 and that Leman has no "property" on it. Oskolkoff concluded by requesting that he receive lot 1.

Leman also responded with a letter dated May 15, 1946. He agreed that the parties could come to no agreement but assigned as reason therefor Oskolkoff's unwillingness to negotiate because of a feeling that he could not lose by allowing this Department to solve the issue. Leman renewed his former assertions that the family of Oskolkoff had not built the house on lot 1 on which Oskolkoff lived and stated that the house had been abandoned at the time when Leman filed his original application to make homestead entry.

On August 23, 1946, the Bureau of Land Management issued another decision canceling Leman's entry as to lot 1, sec. 34, on the ground that one may not include in a homestead entry land occupied by an-

other as a settler in good faith, citing *Atherton v. Fowler*, 96 U. S. 513 (1877); 50 L. D. 355 (1924). It concluded with a statement that the Bureau of Land Management would proceed to consider a homestead application Oskolkoff had filed on June 30, 1938, which the register had rejected as being incomplete on its face. Leman has appealed from that decision, reciting the equities on his own behalf and renewing his assertion that Oskolkoff does not live upon lot 1, sec. 34, but has abandoned the residence, if any, which he might possibly have had in the past.

The facts of this case raise immediately an issue under the provisions of section 7 of the act of March 3, 1891 (26 Stat. 1095, 1098; 43 U. S. C. sec. 165):

\* \* \* after the lapse of two years from the date of the issuance of the register's receipt upon the final entry of any tract of land under the homestead \* \* \* laws, \* \* \* and when there shall be no pending contest or protest against the validity of such entry, the entryman shall be entitled to a patent conveying the land by him entered, and the same shall be issued to him; \* \* \*.

Under this act it is immaterial that, as in this case, no final certificate has been issued. The 2-year period runs from the date of the issuance of the register's receipt upon final entry. *Stockley v. United States*, 260 U. S. 532, 540, 541 (1923). To toll the running of the 2-year period, it is not necessary that the trial of a contest or protest be under way within the prescribed time, although the mere suggestion of the propriety of instituting such proceedings will not be sufficient to stop the running of the period of limitations. It has been held, however, that where within the 2-year period an entryman had notice of a protest and appeared to seek its dismissal, the trial of such a protest could properly commence more than 2 years after the date of the issuance of the register's receipt on final entry. *United States ex rel. McDonald v. Lane*, 263 Fed. 630 (1920); *Jacob A. Harris*, 42 L. D. 611 (1913).

In this proceeding Oskolkoff did not actually submit his protest until June 27, 1945, sometime after the expiration of the 2-year period on March 10, 1945. Despite this fact, we do not believe the Department is precluded from acting on Oskolkoff's protest.

In the circumstances of this case, the receipt issued cannot be held to have activated the statute until, at the earliest, the General Land Office decision of February 1, 1945, when Leman's application to amend his entry was allowed. For until that time the payment made by Leman was in connection with his final proof offered with respect to lots 1 and 2, sec. 34, whereas what Leman now seeks is lot 1, sec. 34, and lot 2, sec. 27. The final proof originally made was, in effect, voluntarily withdrawn by Leman, and not until on or after February 1,

March 24, 1947

1945, at the request of Leman, was there offered final proof for the homestead entry for which he now seeks a patent. Oskolkoff's protest was formerly submitted within a few weeks after the submission of final proof on the amended entry. For these reasons, it follows that the 2-year statute does not bar consideration of Oskolkoff's protest.<sup>2</sup>

Nevertheless, the Bureau's decision of August 23, 1946, should be modified to the extent of eliminating its conclusion that on the basis of the present record the entry of Leman as to lot 1, sec. 34, should be canceled. If Oskolkoff is a settler in good faith upon lot 1, sec. 34, within the meaning of the act of July 8, 1916, as amended (39 Stat. 352; 40 Stat. 632; 48 U. S. C. sec. 373), Leman's entry should be canceled *pro tanto*. *Atherton v. Fowler*, *supra*. But the contradicted self-serving statements thus far submitted to support the allegations of Oskolkoff's protest as to his settlement and his good faith are not evidence of a quality sufficient to warrant cancellation of Leman's entry. On the other hand, Oskolkoff's protest is adequate in substance to avoid summary dismissal. In such circumstances, if Oskolkoff and Leman remain unable or unwilling to come to any agreement, a hearing should be scheduled at which Leman, Oskolkoff, and the United States, as well as other interested persons, may appear in person or through counsel, offer testimony personally and through other witnesses, and submit to cross-examination concerning the matters in dispute between Oskolkoff and Leman as to lot 1, sec. 34.

The decision of the Bureau of Land Management is modified accordingly, and the case is remanded to the Bureau for further proceedings in accordance with this decision.

C. GIRARD DAVIDSON,  
*Assistant Secretary.*

## RIGHT-OF-WAY RESERVATIONS IN INDIAN PATENTS

### Indian Allotments—Reservation of Rights-of-Way—Ditches or Canals— Bureau of Land Management.

As it is not certain whether Congress intended for the Department to reserve rights-of-way for ditches or canals in patents to lands which were in the public domain as of August 30, 1890, but which were subsequently incor-

<sup>2</sup> The record also shows that there is a deficiency of 35 cents in Leman's payment of final fees and commissions. Testimony fees amounted to \$1.80. For final proof on 84.58 acres, the charge to Leman was \$2.10 plus 50 percent, or \$3.15. The total amount due, therefore, was \$4.95 (43 CFR 65.24, 166.8). The total amount paid by Leman, however, was \$4.60. But in the light of what has been said, *supra*, there is no need to consider whether, because of this deficiency, the statute has not commenced to run. Cf. *Stockley v. United States*, 260 U. S. 532, 540, 541 (1923); *Gilbert v. Spearing*, 4 L. D. 463, 466 (1886); Instructions of June 4, 1914, 43 L. D. 322, 323.

porated in Indian reservations and are being distributed by allotment to individual Indians, there is leeway for a reasonable administrative construction of the right-of-way provision in the act of August 30, 1890.

The previous administrative construction of the right-of-way provision, to the effect that when an Indian reservation has been carved out of the public domain since August 30, 1890, and is to be distributed by allotment to individual Indians, such land is subject to the right-of-way for ditches or canals reserved by the Government, is not unreasonable, and, if adhered to in the future, would not be upset by the courts.

The legislative history of the right-of-way provision in the act of August 30, 1890, indicates that Congress probably intended for it to relate only to patents issued in recognition of rights acquired in public domain lands through occupation, entry, or settlement, and not to the distribution of Indian reservation lands among individual Indians. Hence, the Department could properly adopt such an administrative construction of the legislation at the present time for application in the issuance of future patents, notwithstanding the contrary construction heretofore followed by the Department.

M-31156 (Supp.)

MARCH 24, 1947.

TO THE SECRETARY.

A memorandum dated October 31, 1946, to the Secretary from the Director of the Bureau of Land Management submits a question concerning the right-of-way provision in the act of August 30, 1890 (26 Stat. 391; 43 U. S. C. sec. 945), as construed by the Solicitor's opinion of January 27, 1943, 58 I. D. 319.

The statutory provision mentioned above, as it appears in the United States Code, provides that—

In all patents for lands taken up after August 30, 1890, under any of the land laws of the United States or on entries or claims validated by the Act of August 30, 1890, west of the one hundredth meridian, it shall be expressed that there is reserved from the lands in said patent described a right of way thereon for ditches or canals constructed by the authority of the United States.

The solicitor's opinion of January 27, 1943, passed upon the question as to whether, under the right-of-way provision in the act of August 30, 1890, the Department of the Interior could construct ditches or canals across the tribal lands of the Indians located on the Flathead Reservation in Montana, and across lands allotted to individual Indians out of that reservation, without paying compensation to the tribe or to the individual owners of the allotted lands. The Solicitor held that ditches or canals could not be constructed by the Department across the tribal or allotted lands without the payment of compensation. The grounds of the decision were that, by virtue of a treaty between the Indians and the United States, all the Flathead lands were in a tribal status as of August 30, 1890; that such lands were not subject to the reservation of the right-of-way provided for in the act of August 30, 1890; and that the allotted lands did not become subject



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to such reservation by reason of their distribution among individual Indians subsequent to August 30, 1890.

During the course of his opinion, the Solicitor stated by way of dictum that the statutory provision under consideration "applies \* \* \* to allotments made and patented from land of Indian reservations created out of the public domain by statute or Executive order subsequent to 1890." With respect to this dictum, the Director of the Bureau of Land Management points out that a serious administrative burden is involved in the attempt to determine, when patenting to individual Indians or their successors allotments out of Indian reservations, whether such reservations were in existence as of August 30, 1890, or were created out of the public domain subsequent to that date.

The question as to whether the Congress intended for the Department to reserve rights-of-way for ditches or canals in patents to lands which were in the public domain as of August 30, 1890, but which were subsequently incorporated in Indian reservations and are being distributed by allotment to individual Indians, cannot be answered with certainty, in my judgment. There would seem to be no question as to the power of Congress to provide for the retention by the Government of rights-of-way in such a situation, without compensating the Indians for whose benefit the reservation was originally created, where the reservation was created after August 30, 1890, by Executive action. (See *Sioux Tribe v. United States*, 316 U. S. 317 (1942); *Confederated Bands of Ute Indians v. United States*, 330 U. S. 169 (1947).) However, it is not clear whether Congress, in the act of August 30, 1890, intended to legislate with respect to this point. Consequently, I believe that there is leeway for a reasonable administrative construction of the right-of-way provision.

On the one hand, it can be argued with considerable persuasiveness that when an Indian reservation has been carved out of the public domain since August 30, 1890, and is to be distributed by allotment to individual Indians, such land has been "taken up after August 30, 1890, under \* \* \* land laws of the United States" and, consequently, is subject to the right-of-way mentioned in the statute. Certainly, the administrative construction of the statute to this effect in the past cannot be regarded as unreasonable, and an adherence to this construction in the future would not, in my judgment, be upset by the courts if subjected to attack in judicial proceedings.

On the other hand, I believe that an equally convincing argument can be made for the proposition that land which is part of an Indian reservation as of the time of its distribution by allotment to individual Indians is not subject to the right-of-way provision in the act of August 30, 1890, irrespective of the status of the land as of August 30,

1890. The legislative history of this statutory provision is set out in considerable detail in the Solicitor's opinion of January 27, 1943. As indicated in that opinion, the provision originally appeared as a proviso to an item in an appropriation act. In connection with the appropriation of money for topographic surveys, Congress provided that—

\* \* \* so much of the act of October second, eighteen hundred and eighty-eight, \* \* \* as provides for the withdrawal of the public lands from entry, occupation and settlement, is hereby repealed, and all entries made or claims initiated in good faith and valid but for said act, shall be recognized and may be perfected in the same manner as if said law had not been enacted, except that reservoir sites heretofore located or selected shall remain segregated and reserved from entry or settlement as provided by said act, until otherwise provided by law, and reservoir sites hereafter located or selected on public lands shall in like manner be reserved from the date of the location or selection thereof.

No person who shall after the passage of this act, enter upon any of the public lands with a view to occupation, entry or settlement under any of the land laws shall be permitted to acquire title to more than three hundred and twenty acres in the aggregate, under all of said laws, but this limitation shall not operate to curtail the right of any person who has heretofore made entry or settlement on the public lands, or whose occupation, entry or settlement, is validated by this act: *Provided*, That in all patents for lands hereafter taken up under any of the land laws of the United States or on entries or claims validated by this act west of the one hundredth meridian, it shall be expressed that there is reserved from the lands in said patent described, a right-of-way thereon for ditches or canals constructed by the authority of the United States.

When the proviso is considered in its proper legislative setting, it appears to relate to patents issued in recognition of rights acquired in public domain lands through occupation, entry, or settlement. It does not seem to pertain to the distribution of Indian reservation lands among individual Indians, irrespective of when the reservation was created. Accordingly, it would have been reasonable for the Department at the outset to construe the right-of-way provision as inapplicable to patents covering allotments to individual Indians, out of Indian reservations, without regard to whether the reservations were created prior or subsequent to August 30, 1890. I do not believe that the Department would be subject to valid criticism from the legal standpoint if, upon the basis of the factors mentioned in the memorandum from the Director of the Bureau of Land Management, it were to adopt such an administrative construction of the legislation at the present time for application in the issuance of future patents.

Specifically answering the first phase of the inquiry contained in the Director's memorandum, it is my view that the Department is not required as a matter of law to reserve a right-of-way for ditches or canals in patenting to an individual Indian or his successor an allot-

March 27, 1947

ment out of an Indian reservation created from the public domain since August 30, 1890. This answer obviates the necessity of considering the second phase of the Director's inquiry.

\* \* \* \* \*

MASTIN G. WHITE,  
*Solicitor.*

## ARCHEOLOGICAL EXCAVATIONS

### Bureau of Reclamation—Construction Costs—Archeological Excavations— Davis Dam Project.

Funds appropriated for the construction of the Davis Dam project may be used to defray the cost of excavating archeological sites on lands owned by the Government in order to preserve from loss by flooding valuable relics belonging to the Government which would necessarily be lost otherwise as a result of the construction of the project and the spreading of the waters in the reservoir.

M-34840

MARCH 27, 1947.

TO THE CHAIRMAN, COORDINATION COMMITTEE.

On January 20, you requested my opinion on the legality of expending funds appropriated to the Bureau of Reclamation for the construction of the Davis Dam project in order to defray the cost of excavating archeological sites containing valuable relics which otherwise would be lost due to flooding as a result of the construction of the dam and reservoir.

It is inferred from the memorandum dated November 19, 1946, of the Associate Director, National Park Service, relative to this subject that the archeological sites in question are located upon lands owned by the United States which are to be flooded as a result of the construction of the project, and that the relics are the property of the Government. Upon the basis of this understanding, it is my opinion that the funds appropriated for the construction of the dam and reservoir project may be used to defray the cost of excavating the archeological sites in order to preserve from loss by flooding valuable relics owned by the Government.

This situation is somewhat similar to that considered by the Comptroller General in 7 Comp. Gen. 227. In preparation for the construction of Government buildings, it was necessary to close certain streets in the District of Columbia and to divert or relocate water mains and sewers previously maintained within the area. The Comptroller General held (p. 228) that—

The vacating of the streets to be used as parts of the sites includes the removal of existing water mains and sewers. Obviously these can not be removed with-

out making provision for diverting the water and sewage. Such diversion is, therefore, necessarily incidental to the vacating of the streets and, accordingly, expenditures for such purpose either in connecting the mains and sewers with other existing mains and sewers, if feasible, or the relocating of such mains and sewers in other streets, if necessary, are properly chargeable to the appropriations made for the acquisition of sites and the construction of buildings \* \* \*. [Cf. 17 Comp. Gen. 791.]

The appropriation in the Interior Department Appropriation Act, 1947, for the Davis Dam project of the Bureau of Reclamation uses the following language:

For continuation of construction of the following projects in not to exceed the following amounts to be immediately available, to remain available until expended for carrying out projects (including the construction of transmission lines) previously or herein authorized by Congress, and to be reimbursable under the reclamation law:

\* \* \* \* \*

Davis Dam project, Arizona-Nevada, \$7,500,000; \* \* \*.

I believe that the broad authorization from Congress that these funds may be expended for the construction of, and in carrying out, the project as a whole would, under the principle supporting the Comptroller General's decision cited above, permit the expenditure of such funds to excavate and remove from the project site valuable archeological relics belonging to the Government which would necessarily be lost otherwise as a result of the construction of the project and the spreading of the waters in the reservoir.

The question as to whether it is advisable to expend these funds for such a purpose is, of course, one to be decided by the administrative officials of the Department.

MASTIN G. WHITE,  
*Solicitor.*

CLINTON D. RAY

A-24486

*Decided March 28, 1947*

#### Withdrawn Lands—Withdrawals in Aid of Legislation.

A withdrawal in aid of legislation remains legally effective until revoked, even though no legislation has been enacted in 13½ years.

#### Withdrawn Lands—Mining Locations.

The discovery of mineral deposits and the performance of assessment work on withdrawn lands, in the absence of a location perfected by a valid discovery prior to the withdrawal, confers no right under the mining laws prior to the restoration of the lands from the withdrawal. Upon such restoration, the land becomes subject to veterans' preference rights under the act of September 27, 1944 (43 U. S. C. sec. 282).

*March 28, 1947***Sand, Stone, and Gravel—Act of September 27, 1944.**

The act of September 27, 1944 (58 Stat. 745; 50 U. S. C., App., sec. 1601), expired on December 31, 1946, when the President proclaimed the cessation of hostilities.

**Special-Use Permit—Mineral Leases.**

Special-use permits are not issued by the Department for withdrawn lands not available under the public-land laws if the permit sought is for the development of minerals.

**Placer Mining Location—Nonmetalliferous Volcanic Cinder Aggregates.**

Nonmetalliferous volcanic cinder aggregates on withdrawn public land which can be extracted and marketed at a profit may be acquired by a placer mining location under the mining laws upon restoration of the withdrawn land. Unless and until the lands are restored and are classified under section 7 of the Taylor Grazing Act, it is unnecessary to determine whether such lands are "valuable chiefly for stone" under the Timber and Stone Act.

**APPEAL FROM THE BUREAU OF LAND MANAGEMENT**

On May 20, 1946, Mr. Clinton D. Ray filed an application<sup>1</sup> for a permit to remove nonmetalliferous aggregates (volcanic cinders, etc.) for the manufacture of building blocks and materials to be utilized in the construction of homes and other buildings. Mr. Ray's application covers the following lands:

T. 22 S., R. 38 E., M. D. M., California,  
sec. 30, S $\frac{1}{2}$ ; sec. 31, N $\frac{1}{2}$ .

On August 26, 1946, the Bureau of Land Management rejected the application on the ground that there is no legal authority under which this Department could issue to Mr. Ray a permit or a lease to mine and remove the deposits of volcanic cinders. The Bureau's decision stated that such deposits can be acquired only by location under the mining laws of the United States, made at a time when the lands containing such deposits are not withdrawn from mining location. The Bureau's decision further indicated that these lands were withdrawn by Executive Order No. 6206 of July 16, 1933; that the application conflicted in part with mineral application, Sacramento 020767, and Power Site Classification No. 241 of November 11, 1929;<sup>2</sup> and that so long as the lands were withdrawn, a new location or a relocation could not be made on the lands, although the withdrawal did not affect any mining locations perfected by valid discoveries made prior to the withdrawal.

<sup>1</sup> The application, not serialized, was filed in the Sacramento district land office and is numbered 2113917.

<sup>2</sup> The records of the Department indicate that the lands also may be subject to Power Site Reserve No. 671 of December 12, 1917, and Federal Power project No. 1396, all for electrical transmission lines.

In his appeal (A-24486), Mr. Ray contends that the various withdrawals do not affect the lands for which he has applied; that his application does not conflict with mineral application, Sacramento 020767; that he discovered such deposits and did assessment work thereon; and that the beneficiaries of Power Site Classification No. 241 have consented to the allowance of his application. The file contains a letter dated May 17, 1946, addressed to this Department, signed by Mr. E. A. Porter of the Water Land Section of the Department of Water and Power of the City of Los Angeles, acting on behalf of Mr. Laurance E. Goit, Chief Engineer of Water Works and Deputy General Manager, stating that the mining and removal of certain nonmetalliferous aggregates from these lands would not affect the water supply or water rights of the City of Los Angeles or other southern California communities, and therefore the Department of Water and Power of the City of Los Angeles would not object to such activity on these lands.

The records indicate that the lands are still withdrawn. Executive Order No. 6206 of July 16, 1933, was issued under the act of June 25, 1910 (36 Stat. 847), as amended by the act of August 24, 1912 (37 Stat. 497; 43 U. S. C. secs. 141-142). Under this order, the lands in which Mr. Ray is interested were, except as to metalliferous minerals, "temporarily withdrawn from settlement, location, sale, or entry, subject to all valid existing rights, in aid of proposed legislation withdrawing the lands for the protection of the water supply of the City of Los Angeles." Although no such legislation has been enacted in the 13½ years which have now elapsed, the withdrawal is still legally effective.<sup>3</sup> The land is also still subject to the reservations for transmission lines.

The records of this Department still carry mineral application, Sacramento 020767, as a pending application. This mineral application (formerly Independence 07952, later Visalia 013072) was filed in 1924 by a Mr. Cordie G. Rodger and others. Adverse claims were filed also in 1924 against that application by a Mr. Guy McGuire, Sacramento 020799 (formerly Independence 08008, later Visalia 013115), and by a Mr. C. W. Wicklund and another, Sacramento 020801 (formerly Independence 08010, later Visalia 013117). The proceedings on the application were therefore stayed, as required by law, until court adjudication of the controversy.<sup>4</sup> However, since copies of the judgment rolls in the court suits instituted by McGuire and Wicklund were not filed in this Department, the case has never

<sup>3</sup> Section 1, act of June 25, 1910 (36 Stat. 847; 43 U. S. C. sec. 141), and Solicitor Finney's opinion (M. 25309) of July 17, 1929, 52 L. D. 675, 677; Richard R. Crandall, A-24444 (Sacramento 036908), November 12, 1946 (unreported); State of Utah, A. 21949 ("F" 1137480), July 10, 1940 (unreported); Jackson Hole Irrigation Company, 48 L. D. 278, 280 (1921).

<sup>4</sup> Rev. Stat. sec. 2326; 30 U. S. C. sec. 30; 43 CFR 185.84.

March 28, 1947

been closed officially on the books of this Department, and therefore still conflicts with Mr. Ray's application.

Although Mr. Ray states that he discovered the deposits and did assessment work thereon, he does not indicate that he made a mining location perfected by a valid discovery prior to the withdrawal of the lands involved, or that he claims any right based on such a prior location. In the absence of any such right, he can acquire no right in the lands under the mining laws prior to their restoration. It is unnecessary to consider whether Mr. Ray's application could have been granted under the act of September 27, 1944,<sup>5</sup> which authorized disposition of up to \$10,000 worth of "sand, stone, gravel, \* \* \* if the disposal of such materials is not otherwise expressly authorized by law." This statute, expressly limited to expire upon the termination of hostilities in World War II, expired on December 31, 1946, when the President proclaimed the cessation of hostilities.<sup>6</sup> Furthermore, although a special-use permit may be issued by the Department for up to 5 acres of public land not available under the public-land laws because the land is withdrawn,<sup>7</sup> such special-use permit is not issued where the use of the land is for the development of minerals.<sup>8</sup>

Since the proposed legislation contemplated by the withdrawal of July 16, 1933, has never been enacted, and in view of Mr. Porter's letter and the fact that the current emergency housing program may be aided by making these building materials available, consideration now should be given to the question whether this land should be restored<sup>9</sup> from the withdrawal. Accordingly, the Department, by letter of December 30, 1946, so informed Mr. Ray and suggested that he might desire to make representations to the City of Los Angeles to secure its agreement to such revocation, and that copies of the judgment roll in the court suits, filed by McGuire and by Wicklund pursuant to their adverse claims, would be necessary before action could be taken to clear the record of those adverse claims.<sup>10</sup>

Mr. Ray's attorney has furnished a copy of a resolution (No. 562, dated December 30, 1946) by the Board of Water and Power Commissioners of the City of Los Angeles that the city would not object to the restoration of the lands sought by Mr. Ray. He has also furnished a copy of the judgment roll in the suit instituted by McGuire and offers to furnish a copy of the judgment roll in the suit instituted by Wicklund.

<sup>5</sup> 58 Stat. 745; 50 U. S. C., App., sec. 1601.

<sup>6</sup> Proclamation 2714, January 1, 1947 (12 F. R. 1).

<sup>7</sup> Solicitor White's opinion of October 22, 1946, 59 I. D. 313; Gilbert F. Newman, A-23379 (Las Cruces 059588), December 18, 1942 (unreported).

<sup>8</sup> 43 CFR, Cum. Supp., 258.2.

<sup>9</sup> The Secretary of the Interior has authority to effect such restoration by a public-land order. Executive Order No. 9337 of April 24, 1943 (8 F. R. 5516).

<sup>10</sup> 30 U. S. C. sec. 30; 43 CFR 185.85.

After the restoration of the land, if it is made, Mr. Ray could then, in accordance with the terms of the order of restoration, endeavor to acquire a title to the deposits in those lands, subject, of course, to the reservations for the transmission lines under section 24 of the Federal Power Act.<sup>11</sup> Mr. Ray will acquire no preference right by virtue of any occupancy by him prior to the effective date of such restoration in accordance with the terms of the order of restoration.<sup>12</sup> Thereafter, if the volcanic cinder aggregates, which Mr. Ray apparently hopes to market from the 640 acres here involved, can be extracted and marketed at a profit, these deposits could be secured by any locator of a placer mining location under the mining laws.<sup>13</sup> Accordingly, there appears to be no need at this time to ascertain or to rule on whether the lands here involved are "valuable chiefly for stone"<sup>14</sup> so as to permit the purchase of up to 160 acres under the Timber and Stone Act,<sup>15</sup> unless and until the lands are restored and are classified under section 7 of the Taylor Grazing Act<sup>16</sup> as appropriately suitable for such disposition.

The decision of the Bureau is affirmed, and the case is remanded to the Bureau (a) to complete action on mineral application, Sacramento 020767, and (b) to consider whether to recommend the restoration of the lands here involved.

C. GIRARD DAVIDSON,  
*Assistant Secretary.*

## SURVEYS AND INVESTIGATIONS REGARDING EFFECTS ON WILDLIFE OF IMPOUNDING WATERS

### Bureau of Reclamation—Fish and Wildlife Service—Impounding Waters— Cooperative Agreements—Surveys and Investigations.

Consultation with the Fish and Wildlife Service regarding effect which the  
impounding of waters will have upon wildlife resources must take place at

<sup>11</sup> 16 U. S. C. secs. 791-823; see 43 CFR 103.8.

<sup>12</sup> Under the act of September 27, 1944 (58 Stat. 747, 748, sec. 4; 43 U. S. C. sec. 282), the land will, upon its restoration, be subject to a 90-day preference to honorably discharged veterans of World War II to file applications under the homestead (43 U. S. C. sec. 161) or desert-land (43 U. S. C. sec. 321) laws, or under the Small-Tract Act of June 1, 1938 (52 Stat. 609, as amended; 43 U. S. C. sec. 682a).

<sup>13</sup> 30 U. S. C. sec. 161. *United States v. Barngrover*, 57 I. D. 533 (1942); *Layman v. Ellis*, 52 L. D. 714 (1929); *Holman v. State of Utah*, 41 L. D. 314 (1912); opinion of Acting Solicitor Fahy, 54 I. D. 294, September 21, 1933; *Stephen E. Day, Jr., et al.*, 50 L. D. 489 (1924); *Stanislaus Electric Power Co.*, 41 L. D. 655 (1912).

<sup>14</sup> See *Forsythe v. Weingart*, 27 L. D. 680 (1898)—building stone; *Parks v. Hendsch*, 12 L. D. 100 (1891)—slate; *Shepherd v. Bird*, 17 L. D. 82 (1893)—limestone for making lime; *Narver v. Eastman*, 34 L. D. 123 (1905)—stone for building culverts and house foundations; *Mordecai v. State of California*, 17 L. D. 144 (1893)—granite rock for building purposes.

<sup>15</sup> Act of June 3, 1878 (20 Stat. 89), as amended by the act of August 4, 1892 (27 Stat. 348; 43 U. S. C. sec. 311). This act applies to lands "valuable chiefly for stone," irrespective of whether or not the land is locatable under the mining laws.

<sup>16</sup> 43 U. S. C. sec. 315f.



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early stage in the planning work on any reclamation project, prior to the authorization of the project in the technical sense.

Authority to determine whether, and to what extent, funds appropriated to the Bureau of Reclamation shall be transferred to the Fish and Wildlife Service for the making of surveys and investigations as to the probable effect upon wildlife resources of the impounding of waters is vested in the Secretary of the Interior.

The existence of authority in section 2 of the act of March 10, 1934, as amended, for the transfer of funds from the Bureau of Reclamation to the Fish and Wildlife Service for surveys and investigations does not prohibit the two Bureaus from entering into cooperative agreements under the Economy Act, with transfers of funds under such agreements from the Bureau of Reclamation to the Fish and Wildlife Service, for services to be performed by the latter in fields other than those specifically contemplated by section 2.

M-34808

MARCH 28, 1947.

TO THE COMMISSIONER, BUREAU OF RECLAMATION.

Your memorandum of December 13, 1946, raising several questions relative to the act of March 10, 1934, as amended by the act of August 14, 1946 (60 Stat. 1080), was referred to this office by Assistant Secretary Gardner. I shall deal with the problems in the order in which they are presented in your memorandum.

1. You refer to the portion of section 2 of the act of March 10, 1934, as amended (16 U. S. C. sec. 662), which provides that—

Whenever the waters of any stream or other body of water are authorized to be impounded, diverted, or otherwise controlled for any purpose whatever by any department or agency of the United States, or by any public or private agency under Federal permit, such department or agency first shall consult with the Fish and Wildlife Service and the head of the agency exercising administration over the wildlife resources of the State wherein the impoundment, diversion, or other control facility is to be constructed \* \* \*;

and you inquire as to when the required consultation must take place.

Neither section 2 nor any other provision of the act, as amended, indicates with any degree of clarity when the consultation provided for in section 2 is required to take place. However, assistance in construing the section with respect to this point is afforded by the legislative history of the amendatory act of August 14, 1946. In a report on the bill which later became the act of August 14, 1946, the House Committee on Agriculture stated, in part:

\* \* \* Although it is impossible to outline specifically in legislation all of the steps that should be taken in planning flood control, irrigation, and similar projects so as to provide also for the conservation of wildlife resources, it is believed that the second and third paragraphs [sic] of the bill establish adequate procedures for the proper coordination of these seemingly diverse interests. As drafted, these two sections require coordination between constructing and operating agencies of both the Federal and State Governments not alone after flood control, irrigation, or impoundment projects have been started but

also in connection with the initial planning for such projects. This type of coordination is extremely important from the standpoint of economical planning and construction as well as from the standpoint of effectuating conservation of wildlife. \* \* \* [H. Rept. No. 1944 on H. R. 6097, 79th Cong., 2d sess. (1946).]

In the light of this statement of purpose, it seems to me that section 2, as amended, must be construed as requiring consultation with the Fish and Wildlife Service and with the head of the appropriate State agency at a rather early stage in the planning work on any project, and prior to the authorization of a reclamation project in the technical sense. Coordination "in connection with the initial planning for" a project could scarcely be said to obtain if the investigations of the State agency and of the Fish and Wildlife Service were begun, for example, after a reclamation project had been "authorized" under section 9 of the Reclamation Project Act of 1939 (43 U. S. C. sec. 485h).

The formulation of procedures for determining the precise time when the appropriate State agency and the Fish and Wildlife Service shall be consulted with respect to a given project is an administrative matter. \* \* \*

2. Your second inquiry involves the final sentence of section 2, as follows:

\* \* \* In the case of construction by a Federal agency, that agency is authorized to transfer, out of appropriations or other funds made available for surveying, engineering, or construction to the Fish and Wildlife Service, such funds as may be necessary to conduct the investigations required by this section to be made by it.

You ask whether the Fish and Wildlife Service or the Bureau of Reclamation "has the final word" regarding the amount of the funds to be transferred to the former under this statutory provision out of appropriations made to the Bureau of Reclamation for reclamation projects.

The last sentence of section 2 merely permits, and does not require, the transfer of funds to the Fish and Wildlife Service. The final authority within the Department to determine whether, and to what extent, funds appropriated to the Bureau of Reclamation shall be transferred to the Fish and Wildlife Service is vested in the Secretary of the Interior by virtue of his statutory power to supervise both agencies (5 U. S. C. sec. 485).

3. You inquire whether the final sentence of section 2 (mentioned in part 2 of this memorandum) and the appropriation to the Fish and Wildlife Service under the item "River basin studies" in the Interior Department Appropriation Act, 1947, preclude the Bureau of Reclamation from making agreements with, and transferring funds to, the Fish and Wildlife Service under the so-called Economy Act (31 U. S. C. sec. 686).

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The present language of section 2, including the final sentence, was enacted by the Congress on a date (August 14, 1946) subsequent to the date (July 1, 1946) of the enactment of the Interior Department Appropriation Act, 1947. When Congress in section 2 authorized the transfer of funds to the Fish and Wildlife Service for surveys and investigations to be conducted by that agency "for the purpose of determining the possible damage to wildlife resources and of the means and measures that should be adopted to prevent loss of and damage to wildlife resources" in connection with the impounding of waters, it presumably was aware of the existence in the Interior Department Appropriation Act, 1947, of the item entitled "River basin studies," which appropriated to the Fish and Wildlife Service funds "For investigations and studies to determine the effects on fish and wildlife resources of proposed developments of river basins of the United States \* \* \* by the U. S. Corps of Engineers and the Bureau of Reclamation \* \* \*." Consequently, the existence of this previously enacted appropriation item does not prevent the transfer to the Fish and Wildlife Service, under the last sentence of section 2, of funds for the surveys and investigations contemplated by that section.

The provisions of the so-called Economy Act (31 U. S. C. sec. 686), relating to transfers of funds between Government agencies, state in part that any Federal agency which has funds available for a particular purpose may place orders with any other Federal agency for services of any kind which may be needed in carrying out the purpose of the appropriation and which the second agency is equipped to render, and the agency requesting the services is required promptly to pay to the other agency, upon its written request, funds to be used in defraying the cost of the work. The Comptroller General has said that this authority "is general in its scope and covers all cases of such authorized transfer of funds from one department or bureau to another for direct expenditure *except where otherwise specifically provided by law.*" (9 Comp. Gen. 89, 90; italics supplied.) Hence, the general provisions of the Economy Act do not cover the field of cooperation between the Fish and Wildlife Service and the Bureau of Reclamation now governed by the specific provisions of the act of March 10, 1934, as amended. As there is, therefore, no conflict between the authority for the transfer of funds contained in the last sentence of section 2 of that act, on the one hand, and the provisions of the Economy Act respecting transfers of funds between Federal agencies, on the other hand, the existence of the authority for transfer in the present language of section 2 does not in any way prohibit the execution of agreements between the Bureau of Reclamation and the Fish and Wildlife Service, and the transfer of funds from the former

to the latter, under the provisions of the Economy Act for purposes which are outside the scope of the act of March 10, 1934.

In this connection, it appears from the present language of section 2 of the act of March 10, 1934, that it is intended to operate prospectively, and the statements made on the floor of the House by the sponsor of the bill to enact such language were to that effect. (92 Cong. Rec. 4520.) I believe, therefore, that transfers of funds from the Bureau of Reclamation to the Fish and Wildlife Service for surveys and investigations of the sort contemplated by the act of March 10, 1934, as amended, but which are to be made by the Fish and Wildlife Service, pursuant to requests submitted by the Bureau of Reclamation in connection with reclamation projects initiated prior to the date (August 14, 1946) of the enactment of the present language of section 2, should be accomplished under the Economy Act rather than under the provisions of section 2.

With respect to services which are to be rendered by the Fish and Wildlife Service in connection with reclamation projects initiated after August 14, 1946, the answer to the question as to whether transfers of funds from the Bureau of Reclamation to the Fish and Wildlife Service should be accomplished under the Economy Act or under section 2 of the act of March 10, 1934, as amended, will depend upon whether the services are of the sort which section 2 contemplates will be performed by the Fish and Wildlife Service. If so, then the arrangements should be made and the necessary funds should be transferred in accordance with the provisions of section 2. Otherwise, the arrangements should be made and the funds should be transferred in accordance with the provisions of the Economy Act.

MASTIN G. WHITE,  
*Solicitor.*

## APPLICABILITY OF OKLAHOMA COMMUNITY PROPERTY ACT TO RESTRICTED INDIAN PROPERTY

**Restricted Indian Property—Oklahoma Community Property Act of 1945—  
State Laws—Federal Indian Laws—Income from Restricted Indian  
Property—Federal Income Tax.**

The restricted property of Indians is subject to the plenary control of the Federal Government.

The States cannot prevent the application of acts of Congress to wards of the Federal Government domiciled therein.

Any conflict between the laws of a State and the laws of Congress relating to the Indians and their restricted property must be resolved against the State. The Oklahoma Community Property Act of 1945 vests in each spouse an undivided one-half interest in property acquired subsequent to marriage, or

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subsequent to July 26, 1945, whichever is later. It likewise vests in each spouse an undivided one-half interest in all income accruing after the marriage, or after July 26, 1945, whichever is later.

With respect to the Indians of Oklahoma, the laws of Congress determine in whom an interest in restricted property shall vest, to whom the income from restricted property shall belong, and whether such income shall be subject to State income taxation.

The Oklahoma Community Property Act conflicts with Federal laws relating to the Indians and their restricted property.

The Oklahoma Community Property Act does not apply to the restricted property of Indians or to the income from such property.

As a division of income between husband and wife for Federal income-tax purposes is not permissible unless that division is based upon a State law which vests in each spouse an undivided one-half interest in the income, the Indians in Oklahoma should be notified that each Indian must report all his income from restricted property on his own return and that it would be improper for one-half of that income to be reported by his spouse.

The income of married Indians from unrestricted sources may be reported to the Federal Government as community income because as to that income the Indian is as much subject to the law of the State as are its non-Indian citizens.

**M-34899****APRIL 2, 1947.**

TO THE COMMISSIONER OF INDIAN AFFAIRS.

This will refer to the memoranda of February 11 and February 28 from Mr. Fred H. Daiker, Director of Welfare, with which he submitted certain questions presented by superintendents of Indian agencies in Oklahoma relating to the applicability of the Oklahoma Community Property Act of 1945<sup>1</sup> to the restricted property of the Indians of Oklahoma. The questions are presented primarily in connection with the filing of Federal income-tax returns for the Indians and their non-Indian spouses.

This office has heretofore instructed the Superintendents of the Quapaw and Five Civilized Tribes Agencies that, where a saving in Federal income taxes can be effected, married Indians should file returns of their income in such a manner as to take advantage of the Community Property Act, i. e., the husband should file a return for one-half of the income and the wife should file a return for the other half of the income. These instructions were based on informal advice from the Bureau of Internal Revenue that, in view of the recently enacted Oklahoma Community Property Act of 1945, it would permit Oklahoma spouses to divide community income equally between them.

The superintendents call attention to the fact that, while considerable savings could be effected by married Indians in their Federal

<sup>1</sup> Session Laws of Oklahoma, 1945, p. 118; 32 Okla. Stats., Annotated, sections 66-82.

income taxes if a separate return is filed for each spouse, the filing of returns in this manner might result in the violation of acts of Congress enacted for the protection of the Indians and their property. The following questions are presented in connection with this point: (1) Whether, where one-half of the restricted income is reported by a non-Indian spouse, the superintendent has authority to pay the Federal income taxes of the non-Indian spouse out of the restricted funds of the Indian spouse; (2) whether, after a Federal income-tax return has been filed for a non-Indian spouse covering one-half of an Indian's restricted income, the portion of the income included in such return may be considered unrestricted for State income-tax purposes; (3) whether a superintendent has authority to pay, out of the restricted funds of an Indian, the State income taxes of a non-Indian spouse, where that income is derived from restricted Indian property which the Congress has declared to be exempt from State income taxes; (4) whether property purchased with restricted funds subsequent to the Community Property Act, where one of the spouses is a restricted Indian and the other spouse is a non-Indian, becomes community property; and (5) whether one-half of the property mentioned in subdivision (4) becomes unrestricted in the event of the dissolution of the marriage by divorce or by the death of the Indian spouse.

The first community property law of Oklahoma was enacted in 1939.<sup>2</sup> Its terms were substantially the same as those of the 1945 act. The 1939 law provided, however, that it should apply only to husbands and wives and to their property after the filing by the parties of a written election to come under its terms. The Supreme Court of Oklahoma, in the case of *Harmon v. Oklahoma Tax Commission*, 118 P. (2d) 205 (1941), held that the income derived by the husband from his separate property after the effective date of his election to come within the scope of the act was community property and should be treated as such for State income-tax purposes. In 1944, the question whether, upon Oklahoma's adoption of the optional community property law, a husband and wife who elected to come under that law were entitled thereafter to divide the community income equally between them for purposes of Federal income tax was considered by the United States Supreme Court. In the case of *Commissioner of Internal Revenue v. Harmon*, 323 U. S. 44 (1944), the Court held that the Oklahoma statute was ineffective to confer on a husband and wife the legal right to divide their income equally between them for purposes of Federal income taxes where that income consisted of the husband's salary, dividends from stock held by the husband and wife as their

<sup>2</sup> Session Laws of Oklahoma, 1939, p. 356.

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separate property, distribution of profits from a partnership of which the husband was a member, and oil royalties due to each of them.

Thereafter, the Oklahoma Community Property Act of 1945 was enacted. As stated above, it is substantially the same as the earlier act, with the elective feature of the 1939 act eliminated. The courts of Oklahoma have not yet construed the 1945 act. However, it seems reasonable to assume that they will follow *Harmon v. Oklahoma Tax Commission* insofar as it holds that income accruing from the separate property of either spouse is to be considered as community income for State tax purposes. The Bureau of Internal Revenue has already ruled that the 1945 Community Property Act of Oklahoma establishes a community property system which, for Federal income-tax purposes, satisfies the test prescribed by the Supreme Court in *Poe v. Seaborn*, 282 U. S. 101 (1930), and that a husband and wife who are domiciled in the State of Oklahoma are entitled to include in their separate Federal income-tax returns one-half of their community income received or accrued on and after July 26, 1945, the effective date of the new act.<sup>3</sup>

The test prescribed by *Poe v. Seaborn* was that of ownership of or interest in the community property. The Court found that, under the State statute there under consideration, all property acquired after marriage by either husband or wife, or by both, except that acquired by gift, bequest, devise, or inheritance, was community property.

The Oklahoma Community Property Act likewise provides that property acquired by either the husband or wife during marriage and after July 26, 1945, shall be deemed to be the community or common property of the husband and wife and vests in each spouse an undivided one-half interest therein. It excepts, however, property owned or claimed by either the husband or wife before marriage or before July 26, 1945, whichever is later, and that acquired afterwards by either the husband or wife by gift, devise, or descent, or received by either as compensation for personal injuries. All debts created by either the husband or wife after marriage or after July 26, 1945, whichever is later, are to be regarded as community debts unless the contrary is satisfactorily proved. In the event of the dissolution of the marriage by decree of any court of competent jurisdiction, the husband and wife are each vested with an undivided one-half interest in the community property as tenants in common. Upon the death of the husband or the wife, the surviving spouse is to administer all community property in the same manner and with the same duties, privileges, and authority as are vested in a surviving partner to administer

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<sup>3</sup>I. T. 3782 (Internal Revenue Cum. Bull. 1946-1, p. 84).

and settle the affairs of a partnership upon the death of the other partner. The surviving husband or wife is required to pay out of the community property all debts of the community, whether created by the husband or the wife; and when all debts of the community have been fully satisfied, the survivor is to transfer and convey to the administrator or executor of the deceased one-half of the community property remaining, to be administered and distributed as other property of the estate. Thereafter, the interest of the surviving spouse in the community property is that of a tenant in common.

The question for determination is whether restricted Indian property comes within the scope of the Oklahoma Community Property Act.

It is well settled that the restricted property of Indians is subject to the plenary control of the Federal Government and that the States cannot, by acts of their legislatures, prevent the application of acts of Congress to wards of the Federal Government domiciled in their States.<sup>4</sup> Any conflict between the laws of a State and the laws of Congress relating to the Indians and their restricted property must be resolved against the State.

With respect to the Indians of Oklahoma, the laws of Congress determine in whom an interest in restricted property shall vest, regardless of whether that interest is acquired prior to or subsequent to marriage or prior to or subsequent to the date of the enactment of the Oklahoma Community Property Act. Those laws likewise determine, in many instances, that the income from the restricted property shall belong to the individual Indian as his or her separate property rather than to the community estate; that such income shall be expended under supervision of the Secretary of the Interior; that such income shall not be subject to State income taxes; and that, upon the death of the individual in whom title is vested, certain persons shall be barred from inheriting the estate.

I shall cite only a few examples of the conflict which exists between the Oklahoma Community Property Act and the Federal laws insofar as restricted Indian property is concerned—

1. The State law vests in each member of the community an undivided one-half interest in the accruing income. Under that law, the income from separate property becomes community property. If real estate is purchased out of the income from separate property, a one-half interest in the real estate would vest in each member of the community. Thus, under the Oklahoma Community Property Act, if real estate were acquired for an individual Indian out of that Indian's

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<sup>4</sup> Board of Comm'rs of Creek County v. Seber, 318 U. S. 705 (1943); Tiger v. Western Investment Co., 221 U. S. 286 (1911); Brader v. James, 246 U. S. 88 (1918); United States v. Boyd, 83 Fed. 547 (1897).



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restricted income, accruing after marriage and after July 26, 1945, an undivided one-half interest in that property would automatically vest in the spouse of the Indian. The Federal act of January 27, 1933,<sup>5</sup> authorizes the Secretary of the Interior to expend funds and other securities held under supervision "for the use and benefit of the individual Indians to whom such funds and securities belong \* \* \*." The Federal act obviously contemplates that the entire interest in any real estate acquired with such funds shall vest in the individual Indian whose funds are used for the acquisition. The act of January 27, 1933, also provides that—

\* \* \* where the entire interest in any tract of restricted and tax-exempt land belonging to members of the Five Civilized Tribes is acquired by \* \* \* purchase, with restricted funds, by or for restricted Indians, such lands shall remain restricted and tax-exempt during the life of and as long as held by such restricted Indians \* \* \*.

Under the State law, if restricted funds, accruing after marriage or after July 26, 1945, were used to acquire restricted and tax-exempt lands, one-half thereof would immediately become unrestricted and taxable, contrary to the law of Congress, unless the spouse were also a restricted Indian.

2. Under the State law, each spouse has an equal interest in all income. However, Congress has declared that Osage allottees or their heirs shall be paid their pro rata shares of the interest on trust funds, the bonus received from the sale of oil or gas leases, and the royalties therefrom received during each fiscal quarter.<sup>6</sup> By the act of June 24, 1938,<sup>7</sup> the amount paid to Osage Indians who have not received certificates of competency shall not exceed \$1,000 a quarter, except in certain circumstances. If the non-Osage spouse of an Osage Indian had an equal interest with the Osage in the income from these sources, under the State community property law, the spouse could demand one-half of the accrued income, regardless of the limitation placed by act of Congress upon Osage Indians without certificates of competency.

3. The act of April 17, 1937,<sup>8</sup> authorizes the State of Oklahoma to levy and collect a gross production tax upon all lead and zinc produced from the lands allotted to the Quapaw Indians. The act contains the following significant language:

\* \* \* In accordance with the uniform policy of the United States Government to hold the lands of the Quapaw Indians while restricted and the *income therefrom* free from State taxation of whatsoever nature, except as said immunity is expressly waived, and, in pursuance of said fixed policy, it is herein

<sup>5</sup> 47 Stat. 777.

<sup>6</sup> Act of June 28, 1906 (34 Stat. 539).

<sup>7</sup> 52 Stat. 1034.

<sup>8</sup> 50 Stat. 68.

expressly provided that the waiver of tax immunity herein provided shall be in lieu of all other State taxes of whatsoever nature on said restricted lands or the income therefrom, and the Secretary of the Interior is hereby authorized and directed to cause to be paid out of the individual Indian funds held under his supervision, *belonging to the Indian owner of the land*, the gross production tax so assessed against the royalty interest of the respective Indian owner \* \* \*. [Italics supplied.]

Thus, Congress has specified that the income from these lands shall be free from State taxation. The income from these lands would not be free from State taxation if one-half thereof vested in a non-Indian spouse of the owner of the land under the Oklahoma Community Property Act.

4. Section 7 of the act of February 27, 1925,<sup>9</sup> provides that none but heirs of Indian blood shall inherit from those who are of one-half or more Indian blood of the Osage Tribe of Indians any right, title, or interest to any restricted lands, moneys, or mineral interests of the Osage Tribe. The prohibition does not apply, however, to spouses under marriages existing as of the date of the passage of that act. Under the Oklahoma Community Property Act, the surviving spouse is automatically vested with an undivided one-half interest in all community property after the debts of the community are paid. Since that community property consists of all income accruing subsequent to marriage or subsequent to July 26, 1945, whichever is later, and all property purchased with such income, a non-Indian spouse would take under the State statute a one-half interest in a deceased Osage's estate, in derogation of the law of Congress.

No useful purpose would be served by additional references to conflicts between the Oklahoma Community Property Act and the laws of Congress. Enough has been said to show that, if the Oklahoma law were applied to the restricted property of Indians, the will of Congress would be frustrated.

Therefore, as the Federal law is paramount in the field of Indian affairs, I conclude that the Oklahoma Community Property Act does not apply to the restricted property of Indians or to the income from such property.

As a division of income between husband and wife for Federal income-tax purposes is not permissible unless that division is based upon a State law which vests in each spouse an undivided one-half interest in the income, the instructions formerly issued to the Superintendents of the Quapaw and Five Civilized Tribes Agencies must be modified. The superintendents, in assisting Indians hereafter in the filing of Federal income-tax returns, should notify them that each Indian must report all his income from restricted property on his

<sup>9</sup> 43 Stat. 1008.

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own return, and that it would be improper for one-half of that income to be reported by his spouse.

Of course, the income of married Indians from unrestricted sources, e. g., salaries and other income derived from the efforts of Indians and their spouses, income from real and personal property held by Indians without restriction or held by their spouses, etc., may be reported to the Federal Government as community income, because as to that income the Indian is as much subject to the law of the State as are its non-Indian citizens.

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MASTIN G. WHITE,  
*Solicitor.*

A. L. COX ET AL.  
WILMA E. DONOHUE

A-24366

*Decided April 4, 1947*

#### Oil and Gas Leases—Holding by Undisclosed Trust.

The Department cannot condone the obtaining of an oil and gas lease by a party in trust for others without a full prior disclosure of all parties having a beneficial interest in the lease and a showing of their qualifications to hold such interests. However, where the existence of the trust has been collaterally revealed to the Department in other proceedings and no fraudulent intent to violate the law appears to have existed, the parties were qualified, and the lease has expired, the Department will not deny a preference-right application by the parties for a new lease based upon the expired lease.

#### APPEAL FROM THE GENERAL LAND OFFICE<sup>1</sup>

This is an appeal by Wilma E. Donohue from a decision of the Commissioner of the General Land Office dismissing her protest against the issuance of a preference-right oil and gas lease, Las Cruces 061870, to A. L. Cox, trustee for Victor H. Anderson, N. S. Williams, and J. N. Hawkins.

The facts are as follows: On April 13, 1939, C. P. Bordages assigned to Cox his prospecting permit, Las Cruces 030677. The Department approved the assignment on October 17, 1939, and on the same day approved the issuance to Cox of a 5-year oil and gas lease in exchange for the permit. The lease was dated December 31, 1938, the expiration date of the permit, and bore the same serial number.

In the last year of the lease, J. N. Hawkins filed, on October 4, 1943,

<sup>1</sup> Effective July 16, 1946, the General Land Office and the Grazing Service were abolished and their functions were transferred to the Bureau of Land Management, by Reorganization Plan No. 3 of 1946 (11 F. R. 7875, 7876; 7776).

an application under the act of July 29, 1942 (56 Stat. 726; 30 U. S. C. sec. 226b), for a preference-right lease based upon Cox's lease. Hawkins said that Cox held his lease in trust for Hawkins, Victor H. Anderson, and N. S. Williams under a declaration of trust executed on April 18, 1939; that Cox had refused to assign to Hawkins his interest in the lease; and that the new lease should be issued jointly to Cox, Williams, and Hawkins (Anderson having given up his interest to Cox and Williams), or to Hawkins, if Cox failed to file a preference-right application. Hawkins attached a copy of the declaration of trust in which Cox, reciting that he was the assignee of the permit from Bordages, agreed that he would apply for an exchange lease, and would hold it in trust for Williams, Anderson, and Hawkins. Cox further stated in the declaration that he claimed no interest in the lease but would hold it as escrow agent for the three and would transfer to them all of his interest when called upon to do so.

Two months later, on December 14, 1943, Cox filed an affidavit referring to Hawkins' application. He contended that since the original lease was issued in his name, he had the prior right to file for a lease and to have the lease issued in his name to be administered under the trust agreement. He asserted that Hawkins' action should be construed as that of his (Cox's) agent or as being on his behalf, and he requested the issuance of a lease in his name only.

In this state of affairs, the 5-year term of Cox's lease expired on December 31, 1943. The following day, Wilma E. Donohue filed her application for a noncompetitive lease on all the land included in Cox's lease, some 1,189.46 acres in all.

On October 26, 1944, the Commissioner declared that in applying for and obtaining a lease under the circumstances disclosed, Cox violated the provisions of the Mineral Leasing Act (41 Stat. 437, as amended; 30 U. S. C. sec. 181 *et seq.*), which clearly contemplate that the identity, citizenship, and holdings of all persons having any interest in an oil and gas lease should be disclosed. The Commissioner said that while it was not apparent that the plan followed was adopted to circumvent the law by permitting excessive holdings, it was a clear violation of the law in that nothing in the record showed that the beneficiaries of the trust were qualified either as to citizenship or as to holdings. Cox and the "real owners of the right to a lease" were allowed, however, 30 days to furnish copies of all assignments by the beneficiaries of their interest and affidavits of citizenship and holdings. In response to this decision, various papers were filed by Hawkins, Cox, and Williams, including affidavits as to citizenship and assignments of the interests of the various parties.

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Then, on February 17, 1945, Donohue filed a protest against the issuance of a lease pursuant to Hawkins' application. The protest was based on the grounds (1) that Hawkins could not file an application since he was not the record titleholder of the old lease; (2) that in the absence of a valid preference-right application, the old lease expired on December 31, 1943, and the leased lands became subject to application by others; (3) that Donohue's application, being first in time, gave her a preference right over others; and (4) that the old lease was obtained under circumstances amounting to fraud in that the trust relationship between Cox and Hawkins and the others was not disclosed, and that therefore any equities that Hawkins and the other beneficiaries had to a preference-right lease were vitiated. In connection with the last point, Donohue said that the only reason given for having Cox act as "dummy" lessee appeared in an affidavit executed on November 29, 1944, by Anderson and filed by Hawkins in response to the Commissioner's decision of October 26. Anderson said in his affidavit:

At the time the lease was issued to Mr. A. L. Cox of El Paso County, Texas, he had no interest in same but was acting as a Trustee for the three of us. Mr. Cox had a fixed address in El Paso, Texas, and it was convenient to have him to act for the three of us and the plan was adopted merely as a matter of convenience and with no intention to circumvent any rule or regulation of the Department of Interior.

Donohue urged that there was no valid reason for employing a device of this kind.

In answer to the first ground of protest, Hawkins argued that even if he could not file an application, Cox had filed one by his affidavit of December 14, 1943. As for the charge of concealment, he pointed to three facts in refutation: First, the trust agreement had been recorded in Lea County, New Mexico; second, in a letter of September 12, 1940, to the Department asking for relief from rentals on the lease, Hawkins stated that the lease "was issued to Mr. A. L. Cox, who acted for himself and his associates, of whom the writer is one"; third, in applying on May 27, 1939, for approval of an assignment to them of lease, Las Cruces 032127, both Williams and Hawkins filed affidavits of citizenship and holdings in which they claimed an interest in—

Las Cruces Serial 030677, C. P. Bordages, assignee from P. W. Cooper, assignor, reassigned by Bordages to A. L. Cox, Trustee for—

Victor Anderson, El Paso, Texas, 674 acres.

N. S. Williams, El Paso, Texas, 674 acres.

J. N. Hawkins, El Paso, Texas, 674 acres.

These affidavits were filed less than 2 months after execution of the trust declaration and over 4 months prior to issuance of the lease to Cox.

Upon a consideration of these facts, the Commissioner, by decision of April 15, 1946, dismissed Donohue's protest and transmitted lease forms to be executed by Cox, as trustee for Anderson, Williams, and Hawkins. Hawkins' application was rejected so far as it asked for the issuance of a lease to him, but it was considered as supplemental to Cox's informal application. The Commissioner based his decision upon the fact that the showings filed by the parties made it apparent that there had been in fact no violation of the law with respect to citizenship or acreage holdings and that there had been no willful intent to violate the law. He relied principally upon the affidavit of Anderson as to the reason for using the trust device, and the affidavits of Williams and Hawkins and the September 12, 1940, letter of Hawkins as evidencing absence of intent to conceal the trust arrangement.

From this decision, Donohue has appealed. Her only new ground of appeal is an attack upon Anderson's affidavit. She asserts that Anderson's statement that the trust arrangement was entered into with Cox only because the latter had a fixed address in El Paso was false, because Anderson himself had an address in El Paso from 1921 to 1944, inclusive. This fact, Donohue claims, shows that fraud had been practiced on the Department.

The Department cannot condone the use of the trust device for obtaining leases without a full prior disclosure of all parties having a beneficial interest in the leases and a prior showing as to their qualifications to hold such interests. It is much too easy a method for circumventing the requirements of the mineral leasing law. For that reason, the Department cannot look with sympathy upon the claims of Hawkins and his associates. They were not strangers to the business of oil and gas leasing on public lands—witness Hawkins' and Williams' affidavits of May 27, 1939, showing that Hawkins and Cox had an interest in three other leases and Williams an interest in five other leases—and they should reasonably have known that a disclosure of interests was required. See the discussion of other dealings in another Federal lease by Williams and Hawkins in *Annie L. Hill v. N. S. Williams et al.*, 59 I. D. 370 (1947).

However, since the Commissioner has found, and the record supports his finding, that Anderson, Williams, and Hawkins were qualified to hold interests in the Cox lease both as to citizenship and as to acreage holdings, and that the failure to make a disclosure was apparently not due to a willful intent to violate the law, the Department does not believe that there is a sufficient basis for now canceling the lease which has long since expired. Nor, in the absence of such cancellation and in view of the fact that disclosure was made prior to the termination date of the old lease, does the Department feel that

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a denial of a preference-right lease would be justified simply as punishment for the past dereliction of the parties. Assuming the truth of Donohue's allegation as to the fact of Anderson's residence in El Paso, it does not necessarily lead to the conclusion that the parties had a fraudulent intent in entering into the trust arrangement.

If such was the intent, it is scarcely likely that less than 6 weeks later and over 4 months before the issuance of the lease to Cox, Williams and Hawkins would have disclosed the existence of the trust, even though such disclosure was in a collateral matter.

Donohue's rights to a lease depend solely upon whether or not the preference-right application is allowed. She has no other equities or rights on her own behalf.

The Commissioner's decision is affirmed.

OSCAR L. CHAPMAN,  
*Under Secretary.*

### CARL F. REYNOLDS

A-24412

*Decided April 4, 1947*

#### **Homestead Entry—World War I Veterans—Residence Requirement— Issuance of Patent to Homestead Settler.**

Under the act of February 25, 1919 (40 Stat. 1161; 43 U. S. C. sec. 272a), the time of military service during World War I is deducted from the time otherwise required to perfect title, but residence of at least 7 months during a particular year (i. e., a consecutive period of 12 months) must be shown before patent can issue.

#### **Homestead Entry—Disabled World War I Veterans—Residence Requirement.**

A World War I veteran cannot claim the benefits of the act of August 27, 1935 (49 Stat. 909; 43 U. S. C. sec. 256b), if he incurred his disability after the life of his homestead entry had terminated.

#### **Homestead Entry—Soldiers' and Sailors' Civil Relief Act of 1940— Homestead Entries Previously Canceled.**

The benefits of the Soldiers' and Sailors' Civil Relief Act of 1940 (54 Stat. 1178, 1187; 50 U. S. C., App., sec. 561)—the nonforfeiture clause (section 501); the provision granting credit towards residence (section 502); and the provision permitting final proof without further residence (section 503 (2))—are not available to a person whose entry was canceled prior to the enactment of the Soldiers' and Sailors' Relief Act of October 17, 1940.

#### **Homestead Entry—Reinstatement—Equitable Adjudication.**

Reinstatement of an entry is not granted in a case in which an entryman is not helped by the veterans' legislation and does not derive any support from the general statute concerning equitable adjudication (act of September 20, 1922, 42 Stat. 857; 43 U. S. C. sec. 1161), for the reason that the life of an entry, which is fixed by statute, may not be extended.

APPEAL FROM THE GENERAL LAND OFFICE<sup>1</sup>

Carl F. Reynolds has appealed from a decision of the General Land Office which rejected his application for reinstatement of a stock-raising homestead entry.

On July 18, 1929, Reynolds was allowed a stock-raising homestead entry under the act of December 29, 1916 (39 Stat. 862; 43 U. S. C. sec. 291), for the  $W\frac{1}{2}$ ,  $SW\frac{1}{4}NE\frac{1}{4}$ ,  $W\frac{1}{2}SE\frac{1}{4}$  sec. 13,  $SE\frac{1}{4}NE\frac{1}{4}$ ,  $SE\frac{1}{4}$  sec. 14, T. 12 N., R. 10 W., M. D. M., California, a total of 640 acres. The entry was canceled on November 13, 1935, because of the entryman's failure to submit final proof within the statutory life of the entry. On November 14, 1945, Reynolds filed an affidavit requesting reinstatement of the entry. He stated that "At the time of allowance affiant spent 3 months on the land, after which he was absent to the first part of June 1930, then returned and was on the land 3 months; that in the fall of 1931 he was again on the land for 3 months." He served in the Navy during all this time and claims that that was the reason why he was unable to remain on the land for any longer period each year; that he was sent overseas in 1931 and did not return to the United States before 1933, during which year he spent 60 days on the land; that he was then again ordered to sea and did not return until 1935 when he became physically disabled and was retired. He further contended that in 1936 he spent 8 months on the land but because of bad health could not make any improvements; that he was physically disabled during the following years but was called into military service for limited duty in February 1942, and was again released because of physical disability in June 1945. He requested 1 year's extension of time within which to reestablish his residence, build a habitable house, complete the required stock-raising improvements, and place stock on the land.

The Land Office rejected the application for reinstatement for the reason that the entryman was required to show actual residence on the entry for at least 7 months during one year, and that his allegations therefore do not justify reinstatement of the entry. The decision referred to the fact that after cancellation of the entry the land became subject to the general withdrawal order of November 26, 1934 (Executive Order No. 6910), and therefore pursuant to section 7 of the Taylor Grazing Act, as amended (48 Stat. 1272, as amended; 43 U. S. C. sec. 315f), is now subject to homestead entry only if the Secretary of the Interior should classify and open it to such entry, and even then "homestead entries shall not be allowed for tracts exceeding three hundred and twenty acres in area."

<sup>1</sup> Effective July 16, 1946, the General Land Office and the Grazing Service were abolished and their functions were transferred to the Bureau of Land Management, by Reorganization Plan No. 3 of 1946 (11 F. R. 7875, 7876; 7776).



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On appeal, Reynolds urges that he was physically disabled between June 3, 1935, and February 18, 1942, and that by reason of his many years of service in the armed forces, including service in World War II, he should be granted a reinstatement of his entry.

Official information secured from the Navy Department sustains appellant's allegations concerning his service in the naval forces and discloses that he was on active duty from June 20, 1917, to September 12, 1919; from June 29, 1920, to June 28, 1922; from July 21, 1924, to June 30, 1935; and from February 18, 1942, to August 18, 1945. Accordingly, appellant is entitled to all the benefits conferred by the act of February 25, 1919 (40 Stat. 1161; 43 U. S. C. sec. 272a), upon World War I veterans. That act made legislation previously enacted for the benefit of veterans of earlier wars (43 U. S. C. secs. 271, 272) applicable to World War I veterans, and the time of Reynolds' service in the Navy during World War I is deducted from the time otherwise required to perfect title. However, the statute expressly provides that "no patent shall issue to any homestead settler who has not resided upon, improved, and cultivated his homestead *for a period of at least one year* after he shall have commenced his improvements." [Italics supplied.] 43 U. S. C. sec. 272; see, also, 43 Code of Federal Regulations 181.2. Reynolds has claimed certain residence on the land between 1929 and 1931, and in 1933, i. e., during the 5-year life of his entry. Cf. Revised Statutes sec. 2291; 43 U. S. C. sec. 164; 43 CFR 168.1. But residence of at least 7 months during one particular year (i. e., a consecutive period of 12 months) must be shown in order to permit credit for a year of residence. See act of August 22, 1914 (38 Stat. 704; 43 U. S. C. sec. 231); 43 CFR 166.38. According to his own affidavit, Reynolds' residence on the land, during any of the years of the entry, did not amount to a period of 7 months. His claim of residence is largest with respect to the first year of the entry, July 1929–July 1930. But even for that period it does not exceed 5 months.

Reynolds has alleged that he was disabled in 1935 and retired for that reason. But that fact does not here authorize the Department to dispense with the requirement of at least 1 year's residence. The act of August 27, 1935 (49 Stat. 909; 43 U. S. C. sec. 256b), provides that a World War I veteran—

\* \* \* who was honorably discharged from such service, whose entry was made prior to January 1, 1935, and who *because of physical or mental disabilities has been or may hereafter become unable to perform the prescribed residential and improvement and other requirements* may make proof without further residence, improvement, or cultivation \* \* \*. [Italics supplied.]

The act is not here applicable. For, in any event, Reynolds' inability to comply with the residence requirement before the termination of his entry's life in 1934, could not have been due to any disability which he may have incurred in 1935.

Reynolds' appeal also fails to find support in any of the legislation enacted for the benefit of World War II veterans. He qualifies under that legislation, but none of the provisions afford him any relief in this case.

Section 501 of the Soldiers' and Sailors' Civil Relief Act of 1940 (54 Stat. 1178, 1187; 50 U. S. C., App., sec. 561) provides that no right to any public land initiated or acquired by any person prior to entering military service "shall during the period of such service be forfeited or prejudiced by reason of his absence from the land." Under section 101 (2), however, a "period of military service," within the meaning of the act, can never antedate the date of enactment of the act, October 17, 1940. The life of Reynolds' entry terminated in 1934, and it was canceled in 1935. His right of entry was, therefore, not "forfeited or prejudiced" during any period of military service, within the meaning of the Soldiers' and Sailors' Relief Act of 1940.<sup>2</sup> Similarly, section 502 of that act (50 U. S. C., App., sec. 562) is inapplicable. That section reads, in part, as follows:

If any person whose application for a homestead entry has been allowed \* \* \* after such entry \* \* \* enters military service; \* \* \* the Department of the Interior shall construe his military service to be equivalent to residence and cultivation upon the tract entered \* \* \* *for the period of such service.*  
\* \* \* [Italics supplied.]

Reynolds' entry was no longer in existence at the time his "period of military service," within the meaning of the Soldiers' and Sailors' Relief Act, began. Therefore, credit for any such period could never result in compliance with the residence requirements.<sup>3</sup> Because of the previous termination of the entry, section 503 (2) likewise fails to protect Reynolds. According to that provision, a veteran "may make final proof" without further residence if because of physical incapacities due to the service he has been unable to "return" to the land. But that provision applies only to persons whose homestead entries were in effect when they entered military service on or after October 17, 1940.

While the Department may grant reinstatements in proper cases (43 CFR 105.2), the present facts do not authorize reinstatement of the canceled entry. As shown, the legislation enacted for the benefit of veterans does not help the appellant. Nor does he derive any support from the general statute concerning equitable adjudication (act

<sup>2</sup> The similar provision of section 501 of the Soldiers' and Sailors' Civil Relief Act of 1918 (40 Stat. 440, 448; 50 U. S. C., App., sec. 152), which protected the rights of the military personnel of World War I against forfeiture, likewise does not apply. It related only to rights to public lands initiated or acquired *prior* to entering military service in World War I. Reynolds' entry was made only in 1929.

<sup>3</sup> It may be noted that section 502 of the act, like the provision for veterans of World War I, *supra*, provides specifically that "No patent shall issue to any such person who has not resided upon, improved, and cultivated his homestead for a period of at least one year."

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of September 20, 1922, 42 Stat. 857; 43 U. S. C. sec. 1161). According to the regulations issued under that statute (43 CFR 107.2), equitable adjudication is permitted in the case of entries in which the law has been substantially complied with, but "sufficient proof not submitted, or full compliance with law not effected within the period authorized by law." Under this provision, the time to make proof may be extended as equity and justice require. However, the life of an entry, 5 years, which is fixed by statute, may not be extended. *Albert L. Taylor*, A. 23977, July 5, 1945 (unreported).

The decision of the General Land Office is affirmed.

OSCAR L. CHAPMAN,  
*Under Secretary.*

### UNITED STATES v. VICTOR H. COOKE

A-24221

*Decided April 8, 1947*

#### **Homestead Entry—Double Residence.**

The homestead law requires an entryman in good faith to establish his home on the entry but does not require that his wife and family reside on the entry with him or prohibit him from maintaining a second residence off the entry where his wife and family live. However, where an entryman lives alone upon his entry and his family resides elsewhere, a rebuttable presumption is raised that the entryman has not in good faith established his residence upon the entry.

Where the evidence shows that an entryman resided on his entry during the week and went to town only on week ends to operate his barber shop and to visit his family which resided in town, that in 2 years he tilled half of the cultivable land in his entry, that he made progressive improvements on his entry, including the building of a habitable house at the time when he submitted final proof, and that he later sold his business to concentrate upon his entry, the presumption that he did not establish a residence upon the entry in good faith because he maintained a second residence off the entry is dispelled.

#### **APPEAL FROM THE GENERAL LAND OFFICE<sup>1</sup>**

Victor H. Cooke, a veteran of World War I, formerly of Nampa, Idaho, now of Homedale in that State, has appealed from a decision of April 21, 1945, by the Commissioner of the General Land Office, which rejected Cooke's final proof and canceled his entry on the ground that Cooke had failed to comply with the Three-Year Homestead Law of June 6, 1912 (37 Stat. 123; 43 U. S. C. secs. 164, 169). On the basis of an unfavorable field investigation and report, adverse proceedings had been instituted against the entry, the charges being—

<sup>1</sup> By Reorganization Plan No. 3 of 1946 (11 F. R. 7875, 7876; 7776), the General Land Office and the Grazing Service were abolished and their functions were transferred to the Bureau of Land Management, the change becoming effective on July 16, 1946.

1. That claimant did not establish a residence on the land, as alleged in his final proof;

2. That he did not maintain residence thereon in the manner and for the period stated in the proof and required by law; and

3. That he did not have a habitable house on the land at the time of offering final proof.

On the basis of the evidence given at the contest hearings, the register had recommended dismissal of the charges, but the Commissioner of the General Land Office reversed the register's decision, rejected the final proof and canceled the entry. Upon appeal, Cooke contends that he had complied with all the requirements of the law and that the Commissioner's decision is neither supported by the evidence nor correct in law. He asks that the decision be reversed and patent issued.

The laws controlling in Cooke's case are section 2290, Revised Statutes;<sup>2</sup> the Borah Three-Year Homestead Act of June 6, 1912 (37 Stat. 123; 43 U. S. C. secs. 164, 169), amending sections 2291 and 2297, Revised Statutes; and the act of February 25, 1919 (40 Stat. 1161; 43 U. S. C. sec. 272a; 43 CFR 181.1, 181.2), extending to veterans of World War I certain residence credits in consideration of their military service.

Section 2290, Revised Statutes, deals very particularly with the good faith and intention of the homestead applicant. It requires of him an affidavit that he is the head of a family or over 21 years of age; that he is making his application honestly and in good faith for the purpose of actual settlement and cultivation and not for the benefit of any other person; that he is not acting for or in collusion with others in order to give them the benefit of the entry or of any timber thereon; that he neither has made nor will make any agreement whereby the title which he may acquire from the Government shall inure to anyone other than himself; and that he is not applying to enter the land for purposes of speculation but in good faith to obtain a home for himself.

Section 2291, Revised Statutes, as amended by the Borah Three-Year Homestead Act, deals with residence, absences, improvements, and cultivation, this last not in issue in this case. The relevant portions of section 2291 are as follows:

SEC. 2291. No certificate \* \* \* shall be given or patent issued therefor until the expiration of three years from the date of such entry; and if at the expiration of such time, or at any time within two years thereafter, the person making such entry \* \* \* proves by himself and by two credible witnesses that he \* \* \* *have a habitable house upon the land and have actually resided upon and cultivated the same for the term of three years succeeding the*

<sup>2</sup> 43 U. S. C. sec. 162.

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time of filing the affidavit, and makes affidavit that no part of such land has been alienated, except as provided in section twenty-two hundred and eighty-eight, and that he \* \* \* will bear true allegiance to the Government of the United States, then in such case he, \* \* \* if at that time citizens of the United States, shall be entitled to a patent, as in other cases provided by law: *Provided*, That upon filing in the local land office notice of the beginning of such absence, the entryman shall be entitled to a continuous leave of absence from the land for a period not exceeding five months<sup>3</sup> in each year after establishing residence, and upon the termination of such absence the entryman shall file a notice of such termination in the local land office \* \* \*. [Italics supplied.]

Section 2297, as amended, is as follows:

SEC. 2297. If, at any time after the filing of the affidavit as required in section twenty-two hundred and ninety and before the expiration of the three years mentioned in section twenty-two hundred and ninety-one, it is proved, after due notice to the settler, to the satisfaction of the register of the land office that the person having filed such affidavit has failed to establish residence within six months after the date of entry, or abandoned the land for more than six months at any time, then and in that event the land so entered shall revert to the Government: *Provided*, That the three years' period of residence herein fixed shall date from the time of establishing actual permanent residence upon the land: *And provided further*, That where there may be climatic reasons, sickness, or other unavoidable cause, the Commissioner of the General Land Office may, in his discretion, allow the settler twelve months from the date of filing in which to commence his residence on said land under such rules and regulations as he may prescribe.

The act of February 25, 1919, *supra*, although providing that no patent shall issue to any homesteader who shall not have resided upon, improved, and cultivated his homestead for a period of at least 1 year after he shall have commenced his improvements, also provides that from the remaining 2 years of residence required to perfect title an honorably discharged veteran of World War I may deduct not exceeding 2 years of his military service.

The record in this case shows essential facts as follows: Subject to section 2289, Revised Statutes, and the Reclamation Act of June 17, 1902 (32 Stat. 388; 43 U. S. C. sec. 416), Cooke, on May 5, 1938, made reclamation homestead entry (Blackfoot 052873) of 107.50 acres known as Farm Unit C in the Gem irrigation district of Idaho. This land is otherwise described as follows: T. 4 N., R. 6 W., B. M., Idaho, sec. 26, lots 3 and 4, E $\frac{1}{2}$ SW $\frac{1}{4}$ .

In the summer of 1938, Cooke devoted himself to clearing the land, but upon making a satisfactory showing under the second proviso of section 2297, Revised Statutes, *supra*, obtained an extension to May 5, 1939, of the time within which to establish residence. Thereafter,

<sup>3</sup> This absence may be taken in two periods under the act of August 22, 1914 (38 Stat. 704; 43 U. S. C. sec. 231), and upon proper showing may be extended under the act of February 25, 1919 (40 Stat. 1153; 43 U. S. C. sec. 231).

according to his final proof, Cooke established residence on the entry on April 10, 1939, on that date moving into a tent on the land. This he appears to have occupied until in 1940 he constructed a one-room house, 14' by 16', with two windows, a door, a floor, and a shingled roof. This building was later used as a cook house and still later as a granary.

On the basis of the date of May 5, 1938, as the beginning of the statutory life of this entry, Cooke had a period of 5 years, or until May 5, 1943, within which to meet the homestead requirements. He was privileged, however, to offer final proof at any time within that period when he should be able to show the necessary residence, cultivation, and improvements. This Cooke was able to do at a comparatively early date by reason of his service in the Army from October 2, 1917, to March 26, 1919, a period of 17 months and 24 days. Of the required residence of 36 months, 12 months in each of 3 years, 1 year's residence was obligatory on Cooke under the statutory provisions above described. Of this, residence had to be actual for 7 months and might be constructive for as much as 5. Of the remaining 24 months, Cooke was entitled to a service credit of 17 months and 24 days. Deduction of this credit from 24 months left a residence of only 6 months and 6 days still to be performed. This residence had to be actual for only 1 month and 6 days, since the law permits 5 months of constructive residence. Under these rules, therefore, it was necessary for Cooke to show actual residence of only 8 months and 6 days, 7 months in one year and 1 month and 6 days in a second year. It was, therefore, possible for Cooke to offer his final proof considerably in advance of the expiration of the 5-year period on May 5, 1943.

In point of fact, Cooke, on June 21, 1941, gave notice of his intention to make final 3-year proof on August 5, 1941, and on that date did file his proof. He completed his testimony on August 14, 1941. In this he set forth his military service residence credit of 1 year, 5 months and 24 days, and an actual residence of 14 months, or 5 months and 24 days in excess of the 8 months and 6 days mentioned above as required in his case. The residence dates given were as follows:

<i>Actual residence on the land</i>	<i>Absent from the land</i>
1939, April 10 to November 10, 7 months;	November 11, 1939, to March 11, 1940,
1940, March 11 to October 25, 7 months.	4 months;
	October 26, 1940, to August 5, 1941.

Cooke further stated that this residence was maintained by "myself" and that his absences were "for business and during winter, for purpose of earning money to improve and reclaim the land." Cooke also stated that in 1940 he had on the land a four-room frame house with bath, worth about \$500. He also listed as one of his improve-

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ments in 1940 a frame building 14' by 16', worth about \$75. This he called a "Barn now used for cook house." As to farming, he said that of 52 cultivable and irrigable acres he had cultivated and irrigated 28 acres, harvesting fair crops in 1940, and having fair prospects for 1941. Crops mentioned for 1940 were barley, 60 bushels from 6 acres; 99 sacks of wheat, 90 pounds each, from 9 acres; 6 tons of clover hay from 5 acres; 4 tons of oat hay from 4 acres; 10 bushels of corn and considerable fodder from 2½ acres; pasture of 2½ acres; 1941 crops not yet harvested were radish seed from 5 acres; alfalfa hay from 6 acres; barley from 9 acres; wheat from 4 acres; potatoes from 2 acres; pasture on 2 acres.

Action on the proof seems to have been deferred pending field examination, as requested by the special agent. In April 1942 field investigation was made, and in September 1942 a report recommended adverse proceedings on the charges above stated, namely, that neither the establishment nor the maintenance of residence was as stated in the final proof and that there was no habitable house on the land when proof was offered. In July 1943, the General Land Office directed adverse proceedings, and on March 3, 1944, a hearing was held before the clerk of the District Court of the Seventh Judicial District of the State at Caldwell, Idaho. On the basis of the testimony offered the register recommended dismissal of the charges, but the Commissioner held the charges sustained.

As to the establishment of residence, the Commissioner pointed out that this must be the act of the entryman himself, but said that he found nothing in the contest record concerning any single date of initiation of residence or of the beginning of any absence from the land except what Cooke himself had read from his final proof, namely, that he went on the land on April 10, 1939, and stayed there until November 10, 1939 (Tr. p. 38).

As to whether Cooke "maintained" residence as required by the law and as alleged in the final proof, the Commissioner had the following to say:

\* \* \* The absence of the wife and family from the homestead when the entryman is on it does not necessarily vitiate the entry. It is not ipso facto a fatal defect of residence but it may be a circumstance calculated to throw doubt upon the good faith of the entryman's claim that the homestead is his actual home.

\* \* \* \* \*

It is established by the testimony however that the entryman's family never at any time lived on the land. They always lived in the home at Nampa where Cooke went on week ends to conduct his barber shop business.

Residence by an entryman alone is not sufficient. The entry must be the home of the family too, albeit reasonable absences therefrom might be allowable for the schooling of the children and the making of a living. As a matter

of fact there is no evidence that Cooke ever established actual residence on the land at any time. He said at the hearing on March 13, 1944, that he had sold the barber shop in July 1942 and lived on the entry in 1942 and 1943 although the family was living right along in Nampa and it appears that he was not separated from his family. The fact is that Cooke lived in Nampa with his family and conducted his business there and went out to the entry at divers times. The testimony is meager as to the number of visits or the termination or purpose thereof. The details of Cooke's activities in connection with this entry are merely intimated by the barest of and the most indefinite of conclusions and assertions.

\* \* \* \* \*

The showing as to residence, cultivation<sup>4</sup> and the existence of a habitable house at the time of the final proof is not satisfactory. Accordingly, the register's decision is reversed and the entry canceled. \* \* \*

The Department has examined the complete record in this case with particular care. This scrutiny leads it to conclude that on a number of points the Land Office decision has overlooked or undervalued the facts presented.

In the first place, as regards Cooke's establishment of residence,<sup>5</sup> the decision says that the contest record contains no evidence concerning the date of any single initiation of residence or absence except what Cooke himself read from his final proof, namely, that he went on the land on April 10, 1939, and stayed there until November 10, 1939 (Tr. p. 38), and also states that, "As a matter of fact there is no evidence that Cooke ever established actual residence on the land at any time." These statements, however, overlook the fact that Hobart M. Hughes, a witness for the Government, testified (Tr. p. 3) that to the best of his knowledge Cooke had gone upon the land "about the 1st of April, 1939." Hughes thus repeated in March 1944 the statement which he had made in August 1941 when acting as a witness for Cooke on final proof. Further, Arthur Fisher, a witness for Cooke, testified upon questioning (Tr. p. 56) that April 10, 1939, would be pretty close to the time when Cooke first went upon the land, and also that Cooke left the claim that year "about when the water went out," which would be "pretty close to November 10, 1939."

Other contest witnesses were Gerald E. Parker and Lila Seaquest for the United States, and Jack King for Cooke. Of these, Parker was not questioned as to when Cooke first went upon the land, but he and all the others, although not mentioning specific dates, testified to seeing Cooke there "in the spring of 1939." Further, all the witnesses except Fisher testified that in 1939 Cooke lived in a tent on the land. It is also to be noted that Earl B. Antrim, the second witness for

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<sup>4</sup> The question of cultivation was not in issue. No charge had been made that it was inadequate.

<sup>5</sup> In his appeal, Cooke referred to his establishment of residence but did not discuss it.



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Cooke on final proof, was precise as to the time when Cooke established his residence, specifying April 10, 1939, as the date.

In view therefore of the fairly specific testimony by Hughes, Antrim, and Fisher, and the more general testimony of King, Parker, and Seaquest, the Department considers Cooke's alleged establishment of residence on April 10, 1939, as sufficiently corroborated, quite apart from his own testimony.

In the second place, as to whether Cooke had a habitable house on the land when he offered final proof in August 1941, all the hearing witnesses testified that there were *two* "houses" on the land at that time. The first was a small one-room structure, 14' by 16', which had been either built or begun in 1939, and which was livable in early 1940, being completely enclosed, fitted with windows and doors, and having a floor. This evidently was the structure mentioned in Cooke's final proof as "Barn now used for cook house," worth \$75. In the field agent's report of April 1942, it was described as "One rough lumber shed or store house, 14' by 16', lumber floor and shingle roof—\$85.00." At the time of the hearing in March 1944, it was being used as a granary and had acquired a lean-to for chickens.

The second "house" was a sizable four-room structure, worth between \$500 and \$600. The excavation for this had been made in late 1939. In 1940, Cooke had put up the framework, and Arthur Fisher had helped Cooke shingle the house (Tr. p. 59). In 1941, the house had its window and door frames but as yet no windows or doors. In the field agent's photographs taken on April 9, 1942, those sides of the house which appeared showed windows in three of the several frames, but no door. His pictures showed also a floor. All the hearing witnesses testified in 1944 that the windows and doors had been installed in 1942 and that the house was occupied by Cooke in 1942, 1943, 1944. It would seem, therefore, that it had been substantially completed before the hearing and therefore well before expiration of the statutory life of the entry on May 5, 1943, although not on August 5, 1941, when proof was offered.

The testimony of the hearing witnesses also bore on the habitability of these structures. All testified that in 1941 the small house had been occupied by a Mr. Deal, who with Cooke's assistance had farmed the entry that year. They said that Deal, his wife, and five children had all lived in the one-room house during the winter but that in the summer months they had had their sleeping quarters in the big house. Cooke testified that the Deals had moved to the entry in the fall of 1940 and had farmed it until the fall of 1941, all seven members of the family occupying the small house during the winter of 1940-41 but sleeping in the big house in the summer of 1941.

It seems clear, therefore, that, although at the offering of final proof in August 1941 the large house had not been completed and was then being used only for summertime sleeping, there was nevertheless a habitable house on the entry, a house which, although rough and small, was even then serving as the habitation of a family of seven and had so served for almost a full year. The Department accordingly does not agree with the Land Office decision when, although noting some of the facts above recited, it nevertheless concludes that there was not a habitable house on the land in August 1941 at the time of the final proof.

Nor does the Department consider it "significant" that there was "a complete absence of any testimony as to furniture, bedding, cooking utensils, or food in the final proof and contest records." In view of all the testimony given concerning Cooke's residence on the entry, first in 1939 and 1940, and second in 1942, 1943, and 1944, it is plain that in all those years Cooke must have had on the entry the household equipment and supplies which made such residence possible. As for the year 1941 when the Deals were occupying the entry, there is nothing in any of the testimony to show whether Cooke removed these goods or whether the household equipment used by the Deals belonged wholly to them or in part to Cooke. It seems as easy to assume that Cooke left for the use of the Deals what household equipment he had as to assume either that he took everything away or had nothing there to take. In all the circumstances, the Department is unwilling to make any of these assumptions and regards the matter as unimportant.

In the third place, as to whether residence was "maintained as required by law," the decision said that Cooke's family never at any time lived on the land but always lived in the home *at Nampa where Cooke went on week ends to conduct his barber-shop business*. The decision thus implied that Cooke lived on the entry by himself, making week-end trips from the entry to Nampa, and it said in the next sentence that the residence of an entryman alone was not enough, that the entry must be the home of the family too. However, the decision then went on to say that there was no evidence that Cooke ever established residence on the land, and concluded, "The fact is that Cooke lived in Nampa with his family and conducted his business there and went out to the entry at divers times."

This conclusion the Department finds at variance with the record. Neither the affidavits from the field nor the statements of witnesses at the hearing were to this effect. The testimony did not concern itself with trips "at divers times" from Nampa to the entry but on the contrary with Cooke's week-end trips from the entry to Nampa. It was admitted that Cooke's wife and family resided in Nampa, but as to Cooke himself four witnesses testified that Cooke lived on the

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land and made week-end trips from the entry to Nampa fairly regularly. These witnesses were all neighbors. Mr. Hughes and Mrs. Seaquest had homesteads cornering Cooke's entry. Mrs. Seaquest's house was only about 40 rods from Cooke's. She could see his house plainly. Parker had to walk only one-eighth of a mile to see Cooke's house. Fisher lived three-fourths of a mile away on the road to Cooke's land. All four had seen Cooke's car going to town Friday nights or Saturday mornings and returning to the entry on Sunday nights or Monday mornings.

Of these four persons, Hughes, Parker, and Mrs. Seaquest were witnesses for the Government, and on April 9, 1942, had made affidavits for the field examiner. Hughes had said of Cooke, "he generally went to Nampa and worked in his shop Saturday afternoon and evening and would come back to his homestead Sunday night or Monday morning." At the hearing Hughes said that his statement had been correct (Tr. p. 18).

Parker in his affidavit said, "When Cooke has been working on the homestead he was alone, and would spend Saturday and Sunday in town." At the hearing, he said that in 1939 and 1940 it was Cooke's general practice to go to Nampa week ends but not in 1942 and 1943 (Tr. p. 28).

Mrs. Seaquest in her affidavit said, "I know that Victor Cooke worked on his place in 1939 but generally went back to town on Friday afternoon and stayed over Sunday." At the hearing, she said Cooke wasn't on the entry week ends. "He generally left Friday night and came back Monday morning." She said this was true of 1940, as well as of 1939. He was on the entry in 1940 but she couldn't remember for how long (Tr. p. 30).

Fisher, a hearing witness for Cooke, lived on the road to Cooke's entry. He said he saw Cooke's car go by sometimes Saturday mornings but mostly Friday evenings, that he didn't always see the car when it came back, and that it might have come Sunday nights or Monday mornings. He remembered one occasion when it had come on Sunday evening and Cooke had stopped at Fisher's place at the top of the hill to get water for his radiator (Tr. pp. 56, 57). Fisher also testified that he had been on Cooke's place in both 1939 and 1940 and that to the best of his knowledge Cooke had come to the land in the spring and stayed until the fall in both years (Tr. p. 57).

In the light of this record, the Department considers it established that in 1939 and 1940 Cooke did not live in Nampa with his family, going out to the entry only "at divers times," as concluded by the Commissioner, but instead resided on the entry alone, making fairly regular week-end trips to Nampa to work in his shop and visit his family.

As to the period of Cooke's residence in 1939 and 1940, it is to be

noted that on final proof Cooke and his witness Antrim stated that the residence was 7 months in each year, while his witness Hughes made it 7 months in 1939 and 7½ months in 1940. Hearing testimony as to Cooke's establishment of residence tends to confirm these statements as to 1939. Hughes testified that Cooke went on the land about April 1, 1939 (Tr. p. 3). Fisher thought the date was April 10, and he further said that Cooke had left the claim "about when the water went out," which would be pretty close to November 10, 1939 (Tr. p. 56).

As to 1940 also, hearing testimony tends to confirm the specific statements of Cooke, Antrim, and Hughes on the final proof. None of the hearing witnesses gave specific dates as to when Cooke returned to the entry in 1940, or when he left it. But all said that Cooke lived on the claim in 1940 and made his week-end trips as in 1939. Hughes thought Cooke came back in the spring and was there until sometime in the fall (Tr. p. 6). As final-proof witness, Hughes said, "I worked with him quite a bit during the season of 1940. His place corners with my homestead." Fisher testified that he had helped Cooke shingle his house in 1940 (Tr. p. 59). Parker testified that Cooke was back in 1940 (Tr. p. 21). Mrs. Sequest noticed the week-end trips in 1940 as in 1939 (Tr. p. 30). Her 1942 affidavit said Cooke did not live on the entry after the fall of 1940. King, whose entry adjoined Cooke's, said Cooke was on the entry in 1940 and might have been there as long as 7 months (Tr. p. 51).

Further corroboration of Cooke's residence on the entry in 1940 is to be found in Cooke's construction work done in that year.<sup>6</sup> It appears little likely that he could have accomplished the farming and building shown by the record if he had lived in Nampa and paid only occasional visits to the entry, as suggested by the Commissioner. It is also to be noted that none of the witnesses even suggested that Cooke's residence was not of the requisite length. There seems little reason, therefore, to doubt the statements of Cooke, Antrim, and Hughes that Cooke resided on the entry in 1940 as much as 7 months. But even if there were reason to believe that the 1940 residence was shorter than 7 months, it is finally to be recalled that by reason of his military service Cooke was not required to live 7 months on the entry in 1940, but only 1 month and 6 days. In view of the facts presented, the Department is convinced that residence of the requisite length was fully performed in both years by Cooke alone.

As to the residence of Cooke's wife and family, the record amply supports the decision's finding that they lived not on the land but "at Nampa where Cooke went on week ends to conduct his barber-shop business." In his final proof, Cooke stated that his residence on the

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<sup>6</sup> See p. 495, *supra*.

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land was maintained *by himself*. At the hearing he testified that the family had not moved to the entry with him but had remained in Nampa. Asked whether his wife had refused to accompany him, he said that she had desired the two children of school age to continue in the Nampa schools and had not wished to leave them in Nampa alone (Tr. p. 39). He said that a school bus ran near his entry to a grade school in Homedale, and he believed that a few rooms there were set aside for a high school but that this high school was not comparable with that in Nampa. At the time of the hearing, one child had been graduated from high school and the two others were still in the Nampa schools.

Cooke also testified that the notary public before whom he gave his final proof, and who was also a land attorney, had advised him that it was not essential that his family live on the entry and had shown him papers in which the Government "had passed other entrymen without the family living on the entry." Cooke had not consulted the Land Office about this but had relied on the advice of the lawyer-notary that the Government would not make one rule for one man and a different one for another. Cooke testified that it had been his intention to make a home out of this entry (Tr. p. 40). He still wished to do so. He had sold his Nampa barber-shop business in July 1942 in order to "do justice to the homestead." As to that business, Cooke testified that in 1939 and 1940 he had worked at the shop during week ends and in the winter to earn money to improve and reclaim the land. On the occasion of those trips he had visited his family.

In summary then as to the facts, the Department finds that residence was properly established; that there was a habitable house on the entry at the offering of final proof; that Cooke's wife and family never moved to the entry, continuing to reside in Nampa, but that entryman actually inhabited the entry by himself for the periods required by the law, absenting himself at week ends to earn money in his Nampa barber shop and to visit his family. The sole question remaining therefore is one of law, namely, whether the residence demands of the homestead law are satisfied by the inhabitancy of the entry by the entryman alone in the circumstances described.

As appellant has pointed out, neither the homestead statutes nor the departmental regulations in terms demand that the actual residence required by section 2291, Revised Statutes, *supra*, be residence by the wife and family, as well as by the entryman himself. Nor do they otherwise define the term. But it is to be recalled that even before the original homestead act of 1862, in those years when it was the general policy of the Government to use the public lands as a source of revenue, it was nevertheless the object of the Congress in the pre-emption and other public-land statutes to promote settlement of the

country by establishment on the public domain of homes and the families that make them.

It was to induce such settlements in distant parts of the country where Indian incursions, depredations, and massacres made life dangerous for scattered pioneers that the Donation Acts<sup>7</sup> were passed. And in that connection it is not to be forgotten that the Oregon Donation Act put a premium upon settlement by families, for it gave to a married couple twice as much land as to a single man and to the wife in her own right just as much as it gave to her husband. Nor is it to be overlooked that the original proposal to secure homesteads to actual settlers on the public domain, passed by the Congress but vetoed by President Buchanan on June 22, 1860, confined its benefits to heads of families. Hence, although the law as finally enacted on May 20, 1862,<sup>8</sup> was modified to extend the homestead right to single persons of 21 years, it is clear that the concept of the homestead entry as the seat and home of a family may be regarded as implicit in the object and spirit of the homestead law, whatever the status of the applicant, but especially when he is a married man. It is, therefore, not surprising that the Land Department should have essayed in its practice to take account of the spirit as well as the letter of the homestead statutes, and should have thought of homestead residence in terms of the wife and family, as well as of the entryman.

Sections 2290, 2291, and 2297, Revised Statutes, speak merely of an intention "to obtain a home for himself," of "actually resided," and "residence." The Secretary, being charged with the care and the disposal of the public lands and with execution of the statutes regarding them,<sup>9</sup> has discretion as to the rules which he will prescribe for determining what constitutes "a home for himself," "actually resided," and "residence." He has looked for guidance to those general principles of law which ordinarily govern questions of residence, inhabitancy, and domicile. For these questions, "although not in all respects precisely the same, they are nearly so, and depend upon much the same evidence";<sup>10</sup> and in American decisions the statutory term *residence* has generally been interpreted as meaning domicile.<sup>11</sup>

As for *homestead* residence, whether or not it can always be considered identical with domicile in the purely technical sense of that

<sup>7</sup> The Florida Donation Act of August 4, 1842 (5 Stat. 502), for the armed occupation and settlement of the unsettled part of the peninsula of east Florida; the Oregon Territory Donation Act of September 27, 1850 (9 Stat. 496); the Washington Territory Donation Acts of March 2, 1853, and July 17, 1854 (10 Stat. 172, 305); and the New Mexico Territory Donation Act of July 22, 1854 (10 Stat. 308).

<sup>8</sup> The act of May 20, 1862 (12 Stat. 392), was approved by President Lincoln.

<sup>9</sup> Rev. Stat. secs. 453, 2478; 43 U. S. C. secs. 2, 1201.

<sup>10</sup> Shaw, Chief Justice, Supreme Court of Massachusetts, in *Thorndike v. City of Boston*, 1 Metcalf 242, 245 (1840).

<sup>11</sup> See sec. 17, p. 30, "Handbook of the Conflict of Laws" (2d ed.), by Herbert F. Goodrich (West Publishing Co., 1938).

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word, the initiation of homestead residence so closely resembles acquisition of a domicile of choice that its establishment is determined under the same rules as govern cases of technical domicile, with such modifications, however, as the terms of the homestead law necessitate and as the Secretary in his discretion considers the spirit of the homestead law to require. Moreover, there is no question but that homestead residence is in all points identical with a domicile of choice where the homestead applicant removes from the jurisdiction of one State of the Union to that of another, complies with the rules of domicile, and fully observes the additional requirements of the homestead law.

The basic principles common to these questions of domicile and homestead residence are set forth in the discussions of domicile in textbooks on the conflict of laws. These all show that the term *domicile*, derived from *domus*, the Latin word for *home*, is intimately bound up with the concept "home" and a whole complex of related ideas. In the much-quoted, classic definition, which he adopted from the Roman law, Mr. Justice Story, writing in 1841, said:

By the term *domicil*, in its ordinary acceptation, is meant the place where a person lives or has his home. In this sense the place where a person has his actual residence, inhabitancy, or commorancy, is sometimes called his domicile. In a strict and legal sense that is properly the domicile of a person where he has his true, fixed, permanent home and principal establishment, and to which, whenever he is absent, he has the intention of returning (*animus revertendi*).<sup>12</sup> [Italics supplied.]

Mr. Story suggested, however, that a more correct statement might be that that place is properly the domicile of a person—

\* \* \* in which his habitation is fixed without any present intention of removing therefrom.<sup>13</sup> [Italics supplied.]

Other writers use variant phraseology in their definitions of domicile, but all agree that mere bodily presence in a new place does not by itself initiate a domicile of choice. The actual residence, or bodily presence, must be accompanied by a certain intent if the place of new sojourn or physical habitancy is to be converted into such a home as makes the basis of legal domicile. In other words, a domicile of choice can be established only by intent and by act, *animo et facto*. It is not otherwise with homestead entry. These same principles underlie the terms of the homestead law. Under sections 2290, 2291, and 2297, Revised Statutes, the homestead applicant is required to swear that his "purpose," or intent, is "in good faith to obtain a home for himself," and besides making sworn declaration of that *intent*, he is re-

<sup>12</sup> Joseph Story, "Commentaries on the Conflict of Laws," sec. 41, p. 40 (8th ed.), by Melville M. Bigelow (Little, Brown, and Co., Boston, 1883).

<sup>13</sup> *Op. cit.*, sec. 43, p. 43.

quired to perform the *act*, namely, to establish actual permanent residence upon the land within 6 months from the date of entry.

The chief rules implementing these common principles, here phrased with particular reference to homestead rather than domicile, are as follows: First, there must be *intent* to make the desired public lands the applicant's home, or fixed abode. This intent is called the *animus manendi*, the *intent to remain*, and implicit in it, of course, is the *intent no longer to have a home at the former residence*, or domicile; second, there must be *actual bodily presence* on the lands entered, this act of inhabitaney of the entry being called the *factum*. Moreover, these two elements must coexist. The mere intent to acquire a new home on the desired lands, if unaccompanied by the *factum* of bodily removal to the entry and bodily presence there, avails nothing; nor does the fact of removal and presence if those acts be not animated by intent.

It results that in the absence of an intent to remain, no inhabitaney of the new abode on the entry, no actual residence there, whether for 3 years or for longer, is sufficient to create the homestead residence and home envisaged by the homestead law any more than it would create a new domicile. Without the requisite intent, the dwelling place on the entry and the entryman's actual residence therein do not constitute home and homestead residence, but only the actual situs of the entryman; nor is homestead residence or home established any more than a change of domicile is effected, if despite removal to the new place there is an intention to return to the former dwelling place as the home. Exactly as acquisition of a new domicile involves "a present, definite, and honest purpose to give up the old and take up the new place as the domicile,"<sup>14</sup> so establishment of homestead residence and home involves a present, definite, and honest purpose to give up the old dwelling place as home and to take up the entry as home. Accordingly, when bodily presence on the entry is initiated within the statutory period of 6 months and at the same time the requisite intent is present, homestead residence is at once established, just as a new domicile at once comes into being when bodily presence in a new jurisdiction is found to coexist with an intent to have a fixed abode there.

The entryman's intention to remain need not be an intention to remain there for the rest of his life. It is enough if the entryman, like the domiciliary in a new jurisdiction, have a definite and fixed intention to establish on the entry his new fixed home and be without any present intention of removing therefrom to any other place as his home. Nor are absences precluded if the entryman observe the re-

<sup>14</sup> In re Newcomb's Estate, 192 N. Y. 238, 84 N. E. 950 (1908).



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quirements regarding them. An established domicile continues until the domiciliary decides to make a change of home and acts to effect it. It persists independently of absences of whatever duration or purpose. To the homestead entryman, on the other hand, absences are permitted only with limitations, and homestead residence is held to continue only if those limitations be observed. In some States, statutes controlling particular rights, such as voting, office holding, suing for divorce, etc., require as conditions precedent for the exercise of those rights not only an established domicile but actual residence for a prescribed time in addition.<sup>15</sup> Similarly, the homestead law conditions the exercise of the homestead right to obtain title to the entry not only upon the establishment of the homestead residence as above described but upon its maintenance by actual residence, bodily presence, throughout a 3-year period, except for absences of 5 months in each year.

During the 5 months' absences permitted by section 2291, Revised Statutes, neither the entryman nor any member of his family need remain on the entry. All may absent themselves, whether to escape climatic rigors, enable the children to go to school, add to the family income, or accomplish still other purposes. During the rest of each year the actual residence required may, if necessary, be performed by the entryman not personally but constructively through actual residence by his family. Other statutes authorize leaves of absence for 1 year or less because of destruction or failure of crops, sickness, or unavoidable casualty.<sup>16</sup> During such leaves there need be no residence on the entry.

In domicile, whether the party lives in a house of his own or otherwise is usually immaterial. But the mode of habitation becomes of importance whenever evidence is required to determine whether the proper intent has accompanied presence. To aid in supplying such evidence, the homestead law requires the entryman to show at the time of final proof that he has a habitable home of his own on the land.

In the determination of whether homestead residence has been established and maintained, difficult questions often arise. The question whether there has been bodily presence on the entry is a question of fact generally easy to establish by eyewitnesses or circumstantial evidence. But the questions whether there has been a genuine intent to make a home on the entry and whether that home exists are questions of fact not so simple, having to be determined by the inferences to be drawn from a large number of evidential facts. In questions of

<sup>15</sup> 2 Vernier, "American Family Laws" (to January 1, 1931), secs. 81, 82, 122, 123, as to residence requirements for divorce (Chester G. Vernier, assisted by Benjamin C. Duniway, Stanford University Press, 1932); 1 Stimson, "American Statute Law" (to January 1, 1886), pp. 59, 60, secs. 241, 242, as to residence requirements for suffrage, office holding, etc. (Frederic J. Stimson—Charles C. Soule, Publisher, Boston, 1886).

<sup>16</sup> For leaves of absence and excuses for nonresidence see 43 U. S. C. secs. 231-242.

domicile, the party's intent is not always expressed. The homestead application, on the other hand, is required to give sworn expression to the applicant's intent.<sup>17</sup> But even such a declaration of intent may be ambiguous or untrustworthy as evidence. No statement that the desired land is intended to be one's fixed home makes it such unless a genuine intent to remain really exists. Further, the presence may be of equivocal nature, and in that case the intent as to inhabitancy may be still more obscure.

In addition, the motive with which a change of abode is made and a homestead entry is sought may play a part. Ordinarily, motive is entirely immaterial and does not prevent entry and patent so long as there is a real intention to make the entry and the new dwelling place a home. But motive becomes of account whenever there is question whether an alleged intent to make a home on the entry is genuine. Proof of motive may so explain the act of entering as to deprive the inhabitancy of the entry of any evidential value in the determination of an intent to make the new abode and the entry a home. Moreover, proof of motive may also affect the credibility of an entryman's declarations or testimony as to his intention to change his home. Accordingly, in cases where, despite the sworn declaration, there is doubt of the existence of the intent and of its good faith, reliance must be placed on the acts of the entryman.

From the inception of the homestead law, the good faith of the entryman's intent and clear proof that it exists have been the primary concern of both legislators and administrators. In 1885, the Supreme Court called this element of good faith "the essential foundation of all valid claims under the homestead law."<sup>18</sup> In 1911 and 1912, the same point was stressed by the Public Lands Committees and both Houses of the Congress when they were debating the Borah Three-Year Homestead proposal to liberalize the 1862 act.<sup>19</sup> In 1871, Assistant Attorney General Walter H. Smith emphasized the importance of *evidence* of good faith. Referring to the intention of the Congress

<sup>17</sup> Rev. Stat. sec. 2290.

<sup>18</sup> Lee v. Johnson, 116 U. S. 48, 52 (1885).

<sup>19</sup> In the course of the years, the homestead act of 1862 was seen to be not quite the liberal instrument it had early been pronounced, experience showing that the act was unreasonable, even cruel, in its operation, notably in its requirement of 5 years' residence with no statutory absences whatever. This was well known to the sympathetic congressional delegations from the West, but the Congress in general had delayed any reform. Shortly after the turn of the century, however, it became widely recognized that the law's harsh features, together with a developing trend in the Department toward strict administration, were yearly driving 125,000 American farmers of pioneer spirit into expatriation across the northern border, there to take advantage of Canada's far more generous and considerate homestead law, and it was largely the realization of this loss of sturdy citizens and the thousands of dollars which they took with them that spurred the Sixty-second Congress to enact the 3-year law with its provision for 5 months' absences. These absences, it was agreed, would enable the entryman to earn money for his improvements and would also make it possible for his children to attend school in a town.

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to give homesteads to those persons who *in good faith* would settle upon and cultivate unappropriated public land, he said:

\* \* \* In order to protect the Government from imposition by mere speculators, it was deemed necessary to require clear *proof of the intention of the claimant to make the land in good faith his home*. \* \* \*<sup>20</sup> [Italics supplied.]

The homestead law itself, in its requirements as to residence, cultivation, and improvements, including a habitable house, calls for its own special evidence of that good faith.<sup>21</sup> The Commissioner of the General Land Office, when issuing instructions<sup>22</sup> regarding the Borah Three-Year Homestead Law, reminded local officers not only that the homestead laws were enacted primarily for the purpose of enabling citizens of the United States "*in good faith to obtain a home*," but that they required *evidence* of that good faith. He repeated the rule that the entryman must so reside upon, use, occupy, cultivate, and improve the tract of land entered by him as to show satisfactorily that he in good faith at the time of such entry intended to make the land his bona fide home and that it has been his home to the date of final proof, and he warned the officers that the provision of the new law permitting reduction in the required area of cultivation would not be allowed in any manner to relax that rule. Later regulations, after requiring a habitable house for 3-year proof, provide:

\* \* \* Other improvements should be of such character and amount as are sufficient to *show good faith*.<sup>23</sup> [Italics supplied.]

Accordingly, when the required evidence is weak, residence being defective, intermittent or occasional, cultivation meager or neglected, improvements insufficient, the house inadequate or uninhabitable, there immediately arise presumptions against the good faith of the entryman. These, however, are all open to rebuttal upon contest hearings or at final proof. On the other hand, where an ulterior motive for making the entry has been uncovered and established, the presumption of bad faith which arises is not overcome even by a showing of complete observance of the several requirements mentioned.

Of the many facts as to residence which may cast doubt upon the intent to establish a home on the entry, one of the most troublesome is an entryman's maintenance of double residence—a residence in the dwelling place from which he has gone to the entry, as well as the residence on the entry itself. This is not to say that the homestead law prohibits a man from having two residences. Although the law does not accord the homestead right to one owning more than

<sup>20</sup> *Waldo v. Schleiss*, 1 C. L. L. 234, No. 283 (1871).

<sup>21</sup> *Higgins v. Wells*, 3 L. D. 21 (1884).

<sup>22</sup> *Circ. of November 1, 1913*, 42 L. D. 511.

<sup>23</sup> *Circ. 541*, July 16, 1926, par. 27 (c), 43 CFR 166.26.

160 acres of land at the time of making application for a homestead, it nevertheless does not deny the homestead right either to one who owns less land or to one who is well enough off to own a house or lots of whatever value. Nor does the Department hold the entryman prohibited from making certain personal or family *residential* uses of such owned property or of any other off-entry dwelling place. Indeed, it pertinently asks where an entryman is to live during absences from the entry, whether with or without his family.<sup>24</sup>

But although the law thus permits an entryman to have *two residences*, it insists that he have only *one home* and that he make that home on the entry. It insists that he shall have given up his former home not as a place of mere residence, or temporary sojourn, but as a *home*, and that he shall not have any present intention of again making it his *home*. Otherwise his sworn intent to make his fixed home on the entry will be found not to have been in good faith.

Here, as in domicile, the question of which dwelling place is genuinely intended to be the home and which the mere residence finds its answer in the inferences to be drawn from the acts of the entryman and the circumstances of his life, whether trivial or unusual. Always important and often determining among these evidential facts is the place where a married entryman's family resides. Of this, Justice Story says:

\* \* \* the place where a married man's family resides is generally to be deemed his domicil. But the presumption from this circumstance may be controlled by other circumstances; for if it is a place of temporary establishment only for his family, or for transient objects, it will not be deemed his domicil. \* \* \*

And regarding doubtful cases of double residence Minor says:

\* \* \* Great weight \* \* \* should be attached to the presumption of the retention of a prior domicil, and unless the evidence clearly predominates in favor of the home last acquired, the presumption should be in favor of the first as the party's domicil.<sup>25</sup>

These principles are an integral part of public-land law. Countless homestead decisions<sup>27</sup> have applied them, and from time to time

<sup>24</sup> United States v. Hans Peter Jensen, A-23019 (Denver 044135), March 27, 1942 (unreported); United States v. John U. Rencher, A-22957 (Blackfoot 044281), February 27, 1942 (unreported); Harold Paul, 54 I. D. 426 (1934); Higgins v. Wells, 3 L. D. 21 (1884).

<sup>25</sup> Sec. 46, p. 50, *op. cit.*, supra, footnote 12, p. 501.

<sup>26</sup> Sec. 64, p. 123, "Conflict of Laws," Raleigh C. Minor (Little, Brown, and Co., Boston, 1901).

<sup>27</sup> For some early decisions see Thomas v. Thomas, 1 L. D. 89 (1883); Campbell v. Moore, 2 L. D. 159 (1884); Higgins v. Wells, 3 L. D. 21 (1884); Cleaves v. French, 3 L. D. 533 (1885); Elliott v. Lee, 4 L. D. 301 (1886); Grimshaw v. Taylor, 4 L. D. 330 (1886), 6 L. D. 254 (1887); Stroud v. De Wolf, 4 L. D. 394 (1886); West v. Owen, 4 L. D. 412 (1886); William M. Penrose, 5 L. D. 179 (1886); Van Ostrum v. Young, 6 L. D. 25 (1887); B. F. Heaston, 6 L. D. 577 (1888); Gates v. Gates, 7 L. D. 35 (1888); Dayton v. Dayton (On Review), 8 L. D. 248 (1889); Spalding v. Colfer, 8 L. D. 615 (1889); Thrasher v. Mahoney, 8 L. D. 626, 629 (1889); Albert H. Cornwell, 9 L. D. 340 (1889); Bates v. Bissell, 9 L. D. 546, 550 (1889); Wise v. Swisher, 10 L. D. 240 (1890).

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material for public information has included the following paraphrase of the guiding statement by Story:

\* \* \* the law contemplates that the entryman make the land the home of himself and his family, and the failure of his family to reside on the land with him raises a presumption against the bona fides of his residence which must be rebutted at the time of final proof.<sup>28</sup>

Review of a long line of homestead decisions shows three classes of double residence raising presumptions against the entryman's good faith. These three classes are those in which during the statutory life of the entry occupancy of either a former home or some other off-entry dwelling has been maintained—

1. By the entryman and his family during long absences from the entry, no one remaining on the entry.

2. By the entryman alone, his family living on the entry.

3. By the family only, the entryman living alone on the entry.

In many of these cases the presumption of bad faith has been held confirmed. But in many others, unfamiliarity with the refinements of homestead law or with the difference between home and mere residence has been responsible for adverse charges and contests which the Department has dismissed upon examination of the evidential facts.

Such a case of absence of both the entryman and his family was *United States v. Hans Peter Jensen*, A-23019 (Denver 044135), March 27, 1942 (unreported). Here climatic conditions entitled Jensen, a sheepman, to 7 months' absence each year for 5 years, and the departmental decision pertinently asked where Jensen and his family were to reside during those 7 months. It held that there could be no objection to his ownership of the good house which he had in Gunnison, 500 miles away in Utah, or to his residence therein during the 7 months' period; and it found him in compliance with the stock-raising homestead requirements and in complete good faith as to his home on the entry.<sup>29</sup>

In cases showing occupancy of a former home or of some other off-entry dwelling place by the husband alone, the decisions have regarded doubts of the good faith of the entryman's change of residence as dissipated when all else has been regular and in compliance with the requirements. In *Stroud v. De Wolf*, 4 L. D. 394 (1886), the Department applied the rule noted by Story that, in the absence of proof to the contrary, the place where a married man's family resides must

<sup>28</sup> See par. 25 in "Suggestions to Homesteaders and Persons Desiring to Make Homestead Entries" (Circ. 10, April 20, 1911), 40 L. D. 39, 42; see, also, answer 22 in "Answers to Questions by Servicemen About Land Settlement in Alaska" (December 1944).

For the bad faith of a married entrywoman presumed from her husband's failure to live with her on her entry see 43 CFR 166.13, par. 8, Circ. 541, July 16, 1926.

<sup>29</sup> For similar cases of off-entry residence during allowable absences, see *United States v. Estanislado de la O*, A-23491 (Santa Fe 069264), January 11, 1943, and *United States v. Victoriano M. Vigil*, A-23449 (Santa Fe 063389), January 19, 1943 (both unreported).

be deemed to be his domicile or home. Detailing claimant's several acts of compliance with the law, the Department held that the fact that he continued to do business in Madison, Wisconsin, while his family lived on the claim in Dakota Territory, was not sufficient to warrant the conclusion that he had not settled in good faith on the tract or established his residence thereon.

In *Harold Paul*, 54 I. D. 426 (1934), Paul, a policeman, established residence on his entry and maintained it constructively by the residence thereon of his wife and family. In order to support the family and improve the entry, Paul retained his post on the Los Angeles police force, living in his former home in Los Angeles and going to the entry only when off duty. Here the Department said:

The mere fact, however, that the entryman retained his ownership of his former home, kept it furnished and used it as his dwelling place while engaged in his duties as a policeman which necessitated his personal presence in or near the city, does not *prima facie* show *mala fides*.

Citing *Higgins v. Wells*, 3 L. D. 21 (1884), the Department further said:

Keeping a house in a town, to which the family return from time to time, does not in itself prove want of good faith.

It also quoted the following passage from the *Wells* case:

\* \* \* The homestead law is a practical law, and is so devised that it may have a practical enforcement. The law itself provides its own evidence of good faith in improvement, cultivation, and residence; if these exist as facts, the law is satisfied. If the things done on the land are sufficient to warrant good faith, we must infer good faith; and we may not go off the land and find a fact elsewhere, from which we may infer bad faith. For example, if a claimant has a hundred dollars' worth of furniture on his homestead, and two hundred dollars' worth in a house that he occupied before he took the homestead, it would be absurd to infer bad faith from the latter fact. So, if he owns a house in a town, wherein he lived before entering his homestead, and which he retains and visits periodically for purposes of business or pleasure, his good faith is not thereby impeached. The extra furniture and the extra land are not forbidden by anything in either the letter or spirit of the homestead law.<sup>30</sup>

A similar ruling was made in the unreported case of *United States v. John U. Rencher*, A. 22957 (Blackfoot 044281), February 27, 1942. Rencher was a school teacher in Burley and throughout the school term resided alone in the house which he owned in Burley. His wife lived on the entry and Rencher joined her on his vacations. He was

<sup>30</sup> The validity of Wells' residence had been attacked on the ground that as clerk of the county court his personal and legal residence was at the county seat. In 1884, however, it was considered that official duty in a town and residence on a homestead were not incompatible, and the Secretary said that the fact of official position proved nothing. "In this case the removal of his family to the land and the permanent and valuable improvements made are *evidences of good faith* in the claim, *which is, after all, the gist of the whole matter*. These are the ordinary evidences of good faith demanded, and I see no reason for requiring extraordinary evidences in this case." [Italics supplied.]

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charged with never having given up his Burley residence as a *home*. But the Department did not find his occupancy of it incompatible with his declared intention of making the entry his home, since his wife lived on the entry and there was compliance with other requirements.

The Department ruled otherwise, however, in *United States v. Jesse D. Lee*, A. 22782 (Santa Fe 064025), June 30, 1941 (unreported). Lee, a tinsmith by trade, with a tin shop in Roswell, made stock-raising homestead entry of land adjoining his son's ranch about 40 miles from Roswell, and so fenced the entry as to include it within his son's pasture. Lee himself ran only a few head of cattle on the land. Lee's wife resided on the entry in a small adobe house but only for part of the required periods. Lee himself went to the entry on week ends and occasionally on some night during the week. The rest of the time he lived in his nine-room adobe house on his 20-acre farm about 3 miles from Roswell, doing a little cultivating on it and conducting his business in Roswell.

The Department found that there had been no compliance with the residence requirements, the constructive residence by the wife having been defective, and that Lee had never intended to make the entry his permanent home. Instead, he had used the entry primarily to increase his son's pasture land and had continuously maintained his *home* in his nine-room house near Roswell. The presumption of bad faith arising from Lee's residence in his former home was, therefore, confirmed and the entry was canceled.

In the third class of double residence cases, where the husband lives on the entry but the family does not, the presumption of bad faith raised by the family's residence, either in the former home or in some other off-entry dwelling place, has generally been held overcome when the entryman not only has met all other requirements but by all his acts has evidenced good faith concerning his change of residence and has given acceptable explanations of the family's residence away from the entry.

Among the explanations which the Department has deemed meritorious have been those showing that the wife's residence elsewhere has been for transient objects and therefore of only temporary character.<sup>31</sup> Likewise accepted have been those showing the residence elsewhere to have been necessary pending entryman's preparation

<sup>31</sup> Examples of such explanations are found in (1) the wife's impaired health and inability to procure medical treatment near the entry—*Egbert v. Paine*, 2 L. D. 156 (1884); (2) the illness (insanity) and death of wife's father, requiring the wife's presence and assistance—*Grimshaw v. Taylor*, 4 L. D. 330 (1886), and 6 L. D. 254 (1887, On Review); (3) the serious illness of an infant and the physician's advice against moving it to the claim—*Scott v. King*, 9 L. D. 299 (1889); (4) the wife's pregnancy, confinement, protracted convalescence at former home, and consequent temporary inability to travel and join entryman at the claim—*Fee v. Young*, 12 L. D. 472 (1891).

of the home on the claim.<sup>32</sup> But explanations radically different from those showing the family's removal to the entry as a home as being merely deferred have been accepted in numerous cases where the evidential facts support the inference of the good faith intent of the entryman to have his home on the entry and so are held to entitle him to a patent despite the family's residence elsewhere.

Such evidential facts the details of a few cases well illustrate. In *Elisha B. Gates*, 5 L. D. 207 (1886), Mrs. Gates refused to remove from their former home in Pennsylvania to the Dakota entry because she was afraid of storms and cyclones. Her husband's good faith was further questioned because of a 3 months' absence from his entry and because of his offer of final proof at the earliest time permissible under the law giving a soldier credit for his time in military service. The Department found reasonable Gates' reasons for his wife's residence in their former home, and for his absence—a lawsuit and an accident to his hip upon the same side as his wooden leg; it declared that the mere fact of offering final proof at the expiration of the time prescribed by law was not of itself a suspicious circumstance, and it held that there was no evidence to warrant a finding of bad faith. It therefore restored the canceled entry.

In *B. F. Heaston*, 6 L. D. 577 (1888), Mrs. Heaston, the mother of six small children, absolutely refused to live on the claim, alleging that she was confined to her bed most of the time, that she required medical attendance which she could not have on the claim, and that it was impossible for her to move from the former home. Heaston, however, had resided on the entry continuously since settlement, had placed substantial improvements thereon and showed complete compliance with the law save for his family's residence in the former home. Heaston declared that the claim was his only residence and that he was trying to make thereon such a home as would induce his wife to live with him there. The Department held that the wife's continued residence in the former home, apart from her husband, did not prevent Heaston's establishment and maintenance of a residence at another place and that although it raised a presumption against the good faith of that change of residence, the evidence offered showed his good faith and rebutted the presumption.

Still another type of double residence in which the entryman's good faith was held unimpeached by his wife's residence elsewhere is that of *Scott v. Carpenter*, 17 L. D. 337 (1893). This was the case of a pre-emption filing by Carpenter attacked by Scott on a nonresidence charge in which the Department held the validity of Carpenter's residence unaffected by his wife's refusal to live on his claim.

<sup>32</sup> *Hoagland v. Fairfield*, 11 L. D. 543 (1890); *Davis v. Eisbert*, 26 L. D. 384 (1898).



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The Carpenters were not separated and on visits to each other lived together as husband and wife. Mrs. Carpenter was a midwife and nurse, following her profession in Seattle and living on property which she owned. Her husband, however, settled on some forest land, placed on it substantial improvements, including a comfortable habitation, and cultivated part of the claim. He desired to live there because there he could keep away from whiskey. He induced his wife to visit him but could not prevail upon her to remain on the claim. She said that she could "get along better at Seattle." In effect, the Department considered this evidence as overcoming the presumption that Carpenter's residence was in Seattle with his wife, for it held that the fact that his wife declined to live with him could not affect the legality of the entryman's residence and that his preemption filing should remain intact.

In *Edward L. Denney*, A. 23182 (Blackfoot 044870), October 20, 1942 (unreported), the Department accepted explanations of a different character as rebutting the presumption of bad faith raised by the family's residence on adjoining lands during a good part of the statutory life of the entry. The record shows that during the first year of this entry Denney's wife and four children lived with him in the 14' by 16' one-room house which he had built on the entry; that he had livestock, consisting of 50 sheep and 5 or 6 cows, which he pastured and cared for on the entry; and that he cultivated about 12 acres. The gravelly soil was unproductive, however, and he was unable to make a living from crops.

In the second year, conditions on the entry became increasingly difficult. The two children of school age had to walk 2 miles to school and 2 back. Denney's house was blown down. The house with which he was able to replace it was no more adequate than the first for his family's needs. Mrs. Denney was pregnant and ill. She finally refused to live longer on the claim.

In consequence of these adverse conditions, Denney rented and later contracted to buy 240 acres of adjoining land. It contained a three-room house located on the line of the school bus. Denney's wife and four children moved to this house. Here two more children were born and here Mrs. Denney found life easier and care more readily had during her pregnancies and confinements. The two school children were spared the daily 4-mile walk and were able to attend school more regularly. Denney himself, however, continued to live on the entry in order to feed his sheep in the winter and to attend to the lambing in the spring. At the time of the field report, his livestock had increased to 300 sheep and 10 cows, and he had hogs and chickens besides.

In providing supplementary information on his appeal, Denney made no secret of the details of the second residence on the adjoining

land or of the conveniences which it afforded his family. Nor did he conceal the possibility that later on he might decide to make his permanent home on the adjoining land instead of on the homestead, although he planned to make one farm of the two acreages.

In these circumstances, as in the *Heaston* case, *supra*, the Department did not hesitate to hold that Denney was in good faith and that his efforts to comply with the requirements should not be undone by his wife's refusal to continue on the claim and by his consequent maintenance of the second residence. "Under trying circumstances," the Department said, "he has been striving to support himself and family, and he seems to have had some measure of success." The Department thereupon accepted Denney's showing as satisfactory compliance with the requirements of the law and directed issuance of final certificate.

To have decided these cases otherwise would have been to disregard the spirit of the homestead law. This, all authorities agree, requires that great weight be given to evidence of good faith. The Supreme Court half a century ago said that the law deals tenderly with one who, in good faith, goes upon the public land with a view to obtaining a home.<sup>33</sup> The Federal courts hold that the land laws should not be construed strictly and harshly against the homesteader but should be administered liberally to fulfill their purpose.<sup>34</sup> From early days to date, the Department has repeatedly declared that the homestead law should receive a liberal construction when good faith is shown; that decisions in keeping with the spirit of the homestead act and supported by positive evidence of good faith should be sustained; and that the Department will not lend its power to defeating an honest settler and depriving him of his labor and improvements on mere speculative and technical grounds.<sup>35</sup>

Of course, bad faith will always tip the scales against the entryman. In cases of double residence, where the presumption of bad faith raised by the circumstance of the family's residence away from the entry is confirmed by still other irregular circumstances, the entryman will not prevail. The presumption is always held confirmed when an ulterior motive is disclosed, whether the several requirements incident to habitancy are adequately met or not, for any ulterior motive is incompatible with the alleged intent to make a home on the

<sup>33</sup> *Ard v. Brandon*, 156 U. S. 537, 543 (1895).

<sup>34</sup> *United States v. Mills*, 190 Fed. 513, 521 (Ala., 1911).

<sup>35</sup> *Waldo v. Schleiss*, 1 C. L. L. 234, No. 283 (1871); *Vinzant v. Forsyth*, 22 L. D. 422, 423 (1896), and cases cited; *Israel Martel*, 6 L. D. 566 (1888); *Nilson v. St. Paul M. & M. Ry. Co.*, 6 L. D. 567 (1888); *Scott v. King*, 9 L. D. 299, 301 (1889); *Lunde v. Edwards*, 2 L. D. 163 (1884); see, also, legislative history of Three-Year Homestead Law, 48 Cong. Rec. 1014 (62d Cong., 2d sess., January 17, 1912); Hearings before the House Committee on Public Lands on various bills proposing amendments to the homestead laws, January 31 and February 5, 1912, p. 19; page 7 of H. Rept. No. 413 (62d Cong., 2d sess., March 12, 1912).

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entry.<sup>36</sup> The presumption is also held sustained when scrutiny of the entryman's acts shows his alleged observance of the requirements to be only colorable. Where there is evidence that the entryman's actual personal residence on the entry is defective in length or only intermittent or occasional, that his cultivation has been meager, his improvements insufficient, his house inadequate, uninhabitable or uninhabited, that evidence is held to show that the entryman never intended to change his residence and make his home on the entry, but on the contrary intended to keep his home where the family continued to reside and to return there when he should have obtained title to the entry.

In all such cases, deeds speak louder than words. The acts of the entryman determine the issue, and the explanations he gives for the family's residence away from the entry become of no worth, however meritorious in themselves apart from the circumstances, or however acceptable they might be to the Department if all else were regular.

This is well illustrated by *Adams v. Coates*, 38 L. D. 179 (1909). Here Coates' wife and two children never lived on the entry, the excuse being that the wife was afflicted with obesity and heart trouble. This excuse the Department said might have been accepted if the record had given evidence of *bona fide* actual residence by the entryman. But as things were, it was not worth consideration. For Coates' alleged residence on the entry appeared to have consisted of mere visits, transitory and temporary in character, while his improvements were of a minor nature only, and his clearing and cultivation of the land were so nominal as to be a mere pretense. It was, therefore, concluded that at no time did Coates intend to remain on the land and to make it his home but instead intended to keep as his home the place where his family was located.

A double residence case in which defective performance of the requirements and a possible ulterior motive combined to support the presumption against good faith was that of *Benjamin Chainey* (Coeur d'Alene 02526), 42 L. D. 510 (1913). Here the record shows that Chainey lived alone on the entry during the summer season but that his wife and nine children lived in a small house which he owned in Coeur d'Alene, allegedly because the State law required the children to go to school, and no schools were available to his entry. Chainey himself also lived there during his absences from the land. Charges were brought that Chainey had not maintained the required residence and, besides, had made the entry not for a home but for purposes of timber speculation.

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<sup>36</sup> See Charles K. Zenor, Pierre 010209, p. 7 of decision of December 12, 1911, by Assistant Commissioner of the General Land Office (unreported). Secretary's file 2-19 (part 4), Homestead entries—Legislation (62d Cong.), Three-Year Homestead bill, S. 3367.

Bearing on the presumption of bad faith thus raised, the record disclosed evidential facts as follows: Chainey's entry was in a remote area 100 miles distant from Coeur d'Alene, accessible only over poor roads and rough trails and not habitable in all seasons of the year. His land was heavily timbered. Far the greater part of it was unsuitable for cultivation except at great expense for clearing. In the course of 6 years, Chainey had cleared not more than 4 acres. His other improvements were substantial, but his personal residence, performed only during those summer months when the entry was habitable, was even then considerably interrupted and shortened by time-consuming trips to Coeur d'Alene to supervise there the grocery business in which he had an interest.

Chainey's acts, it was held, did not indicate the good faith necessary to be shown where homestead entry is made of valuable timberland not suitable for cultivation and not habitable at all seasons of the year, but on the contrary showed that he did not make the entry in good faith for the purpose of making the land an agricultural home and homestead. Thus the presumption of bad faith was found supported, and in the presence of the several irregularities mentioned, together with the indicated ulterior purpose of speculation in the entry's timber, the school excuse given for the family's residence in Coeur d'Alene received no consideration and was not even mentioned in the decision.

The Chainey decision is frequently cited in homestead residence cases and the following portion of its headnote quoted:

The homestead law contemplates that an entry thereunder shall constitute the entryman's home and family homestead to the exclusion of a home elsewhere; and mere personal presence of the entryman upon the land does not meet the requirements of the law as to residence where he maintains a family residence elsewhere.

Although this passage has often been used as if it stated the rule for those double residence cases in which the entryman lives on the entry but the family does not, it clearly fails to do so, for it fails to mention or even suggest that very important part of the rule which provides that the family's off-entry residence is not necessarily evidence of bad faith but merely raises a presumption which in many circumstances may be overcome. The passage quoted also fails to mention that Chainey's personal residence on the land was of insufficient duration.<sup>37</sup>

A striking number of double residence cases in which the wife has lived away from the entry has arisen in connection with stock-

<sup>37</sup> Chainey's entry was made under the original Five-Year Homestead Law of 1862, which made no provision for absences. Compare *Fred H. Parker*, 42 L. D. 96 (1913). See, also, *Wright v. Larson*, 7 L. D. 555, 556 (1888), citing *Porter v. Throop*, 6 L. D. 691, 693 (1888).

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raising homesteads. In very many of these, an ulterior motive has been readily apparent or even admitted and has frequently been accompanied by defaults in personal residence and stock-raising improvements.<sup>38</sup> The land has been wanted not for a home but for seasonal range, for an additional grazing unit convenient to lands already controlled, for a place to keep the stock, or even, as in the case of *William Paton*, as extra pasture for the horses of the entryman's dude ranch. In many of these cases,<sup>39</sup> it has been said of the wives that they refused to come to the land because they had children in school where they were living and therefore had to remain there.

In this connection, it is to be noted that some<sup>40</sup> of the cases listed above have sometimes been cited as authority for the view that inconvenience in reaching schools serving the entry is not a sufficient excuse for failure of an entryman's family to live on the entry. But this statement by itself is much too broad and in relation to the two cases cited not strictly accurate. In both of them, as in all the other cases listed, it was found and held that the family continued to live in the accustomed home because the entryman never intended to give up that residence as home and intended personally to return to it as such as soon as he should have obtained patent to the entry. And this finding was made without regard for what the entryman may have had to say about sending his children to school. For, as has been pointed out above, in the presence of an ulterior motive for making the entry, no explanations about schools or anything else avail to overcome the presumption of bad faith, but have value only in confirming it.

This, however, is not to say that the school excuse must always be without merit. When the wife's off-entry residence is the sole circumstance impeaching the good faith of the entryman's intent, and the explanation given is what appears to be the wife's sincere desire and determination to keep the children in schools that are accessible and good and her insistence on remaining where she can do so, the Department sees no reason why it should regard that explanation with less respect than it accords to pleas of illness or fear of storms and cyclones.

<sup>38</sup> Edward C. Goetz, A. 22973 (Denver 043611), January 23, 1942; *United States v. John L. Jourgensen*, A. 23572 (Cheyenne 051033), February 23, 1943; *Fremont Michie*, A. 20419 (Cheyenne 045898), July 30, 1937; *United States v. Hyrum Brough*, A. 23552 (Salt Lake City 050215), March 12, 1943; *Guss Everett*, A. 21538 (Santa Fe 062636, 062637), October 20, 1938; *United States v. Nelle D. Hocker, widow of Clarence M. Hocker*, A. 22914 (Denver 041645), January 23, 1942; *United States v. Elmer O. Johnston*, A. 23354 (Blackfoot 046543), November 14, 1942; *Henry M. Montgomery*, A. 22306 (Great Falls 078014, 078040), June 26, 1940; *William Paton*, A. 20957 (Buffalo 030243), November 10, 1937; *Edwin Stott, Jr.*, A. 23025 (Salt Lake City 050456), May 27, 1942; *William E. Young*, A. 23469 (Salt Lake City 051753), December 18, 1942.

<sup>39</sup> For example: *Brough*, *Everett*, *Hocker*, *Johnston*, *Montgomery*, *Paton*, *Stott*, and *Young*, *supra*, footnote 38.

<sup>40</sup> For example: *Paton* and *Brough*, *supra*, footnotes 38, 39.

In appellant's case, the rules to be applied are those of the third class of double residence, just discussed. Cooke lived on the land, but his family resided in Nampa, allegedly because Mrs. Cooke insisted on sending the children to the well-established high school there available. This raised a presumption against the good faith of Cooke's residence on the land and his alleged intent to make his home there. Whether this presumption is to be supported or overcome depends upon the inferences to be drawn from the evidential facts.

The record and the testimony at the hearing show the following facts: There has been no adverse party. No one except the special agent objected to the final proof. The case is one between the Government and Cooke. Insofar as appears, Cooke has never disposed of his interest in the claim nor attempted to do so. He has lived on the land since making final proof and has made substantial, well-constructed additions to his improvements.

The evidence neither shows nor implies that Cooke had any ulterior motive in making the entry. It shows him as reiterating his intent in good faith to make his home on the land and his hope that his family will join him there. It does not suggest that his relation to the entry was one of only colorable compliance with those requirements designed to test the good faith of his intent. Instead, the evidence shows that in the short period of only 2 years Cooke had put half of the cultivable land under tillage and had produced not only crops but seed. It also shows progressive improvement in the character of his buildings, looking towards permanency. It shows actual personal residence by Cooke for more than the required time before final proof and residence after proof as well.

In the Department's view, all that Cooke did indicated purpose, determination, industry, and good faith. Living alone for more than the requisite time, clearing his fields, farming his crops, stocking his farm, adding substantial buildings as he found the means to do so, using his barber shop to earn money for his improvements, and, when he was able, selling it in order to concentrate upon the entry, these are hardly the acts of a man in bad faith who makes an entry for commercial or speculative purposes. Rather, they are acts persuasive that Cooke in good faith went upon the land with the intent of obtaining a home, a home which he hoped his wife would some day wish to share. In these circumstances, the Department finds Cooke's explanation of his wife's off-entry residence trustworthy and acceptable and the presumption of bad faith rebutted.

The Commissioner's decision is reversed.

OSCAR L. CHAPMAN,  
*Under Secretary.*

## DEFINITION OF PRIMARY TERM OF OIL AND GAS LEASES

**Oil and Gas Leases—Definition of Primary Term—Extension of Leases by Payment of Compensatory Royalties—Section 17 of Mineral Leasing Act.**

As used in section 17 of the Mineral Leasing Act, the "primary term" of an oil and gas lease means the initial 5-year term of the lease.

Oil and gas leases issued under section 17 are entitled to the extension granted by that section upon the payment of compensatory royalties only if such payment is made during the initial 5-year term of the lease, i. e., the "primary term."

Extensions granted to a lease by the act of December 22, 1943 (57 Stat. 608), and subsequent acts, do not constitute part of the primary term of the lease within the meaning of the provision for lease extension by the payment of compensatory royalties.

M-34872

APRIL 9, 1947.

TO THE DIRECTOR, GEOLOGICAL SURVEY.

You have asked for my opinion on a question arising out of the following situation: A noncompetitive oil and gas lease was issued to R. O. Roy for a 5-year term expiring on April 17, 1944 (G. L. O. 06360). Because the leased lands were on that date situated on the known geologic structure of a producing gas field, the term of the lease was extended to December 31, 1946, by the acts of December 22, 1943 (57 Stat. 608), September 27, 1944 (58 Stat. 755), and November 30, 1945 (59 Stat. 587). Since October 1, 1945, the lessee has been paying compensatory royalty in lieu of drilling on the lease because the lands are being drained by operations on adjacent land.

You ask whether under section 17 of the Mineral Leasing Act, as amended by the act of August 8, 1946 (60 Stat. 950; 30 U. S. C. sec. 226), Roy may have the term of his lease extended beyond December 31, 1946, by the continued payment of compensatory royalty.

The pertinent portion of section 17, as amended, reads as follows:

Whenever it appears to the Secretary of the Interior that lands owned by the United States are being drained of oil or gas by wells drilled on adjacent lands, he is hereby authorized and empowered to negotiate agreements whereby the United States, or the United States and its lessees, shall be compensated for such drainage, such agreements to be made with the consent of the lessees affected thereby and the *primary term* of any lease for which compensatory royalty is being paid shall be extended by adding thereto a period equal to the period during which such compensatory royalty is paid. [Italics supplied.]

In its revision of the oil and gas regulations on October 28, 1946 (43 CFR, Part 192, 11 F. R. 12956), the Department construed this provision as follows:

192.8 *Protection of leased lands from drainage.* Where land in any lease is being drained of its oil or gas content by a well either on a Federal lease issued

at a lower rate of royalty or on land not the property of the United States, the lessee must drill and produce all wells necessary to protect the leased lands from drainage. In lieu of drilling such wells, the lessee may, with the consent of the Director of the Geological Survey, pay compensatory royalty in the amount determined in accordance with 30 CFR sec. 221.21.

A period equal to that for which compensatory royalty is paid in lieu of drilling on any Federal lease under this or the preceding section shall be added to its primary term where there is no producing well on the lease. For such purpose the primary term of a noncompetitive lease means the initial five year term and the single extension of five years authorized by section 17 of the act.<sup>1</sup>

It seems clear from the statute that a lease is to be extended only if compensatory royalty is being paid during and at the end of the "primary term" of the lease. The question therefore is what is meant by the phrase "primary term." Specifically, in this case, are the extensions granted beyond the end of the 5-year term of Roy's lease by the acts of 1943, 1944, and 1945, *supra*, to be considered as part of the primary term of his lease? If not, Roy is not entitled to an extension of his lease because he did not commence the payment of compensatory royalties until October 1, 1945, over a year following the end of the 5-year term of his lease.

The expression "primary term" was first introduced into section 17 of the Mineral Leasing Act by the act of August 8, 1946, *supra*. As used in section 17, it seems clearly to mean only the initial 5-year term of the lease and does not include any extensions. For instance, the first paragraph of section 17, which contains the general authority to issue oil and gas leases, provides that—

\* \* \* Leases issued under this section shall be for a *primary term of five years* and shall continue so long thereafter as oil or gas is produced in paying quantities. [Italics supplied.]<sup>2</sup>

Also, the third paragraph of section 17 states that—

Upon the expiration of the *primary term* of any noncompetitive lease maintained in accordance with applicable statutory requirements and regulations, the record titleholder thereof shall be entitled to a single extension of the lease, unless then otherwise provided by law, for such lands covered by it as are not on the expiration date of the lease within the known geological structure of a producing oil or gas field or withdrawn from leasing under this section. \* \* \* Such extension shall be for a period of five years and so long thereafter as oil or gas is produced in paying quantities and shall be subject to such rules and regulations as are in force at the expiration of the *initial five-year term* of

<sup>1</sup> The "preceding section" referred to concerns agreements with owners of adjacent lands to pay compensatory royalties to the United States, or to the United States and its lessees (43 CFR 192.7).

<sup>2</sup> Compare section 17 (a) [sic] (30 U. S. C. sec. 226d), which was added to the Mineral Leasing Act by the act of August 8, 1946. This section, which authorizes the exchange of new leases for old, provides that such new leases are to be "for a primary term of five years and so long thereafter as oil or gas is produced in paying quantities."



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the lease: \* \* \* Any noncompetitive lease which is not subject to such extension in whole or in part because the lands covered thereby are within the known geologic structure of a producing oil or gas field at the date of expiration of the *primary term* of the lease, and upon which drilling operations are being diligently prosecuted on such expiration date, shall continue in effect for a period of two years and so long thereafter as oil or gas is produced in paying quantities. [*Italics supplied.*]

That Congress did not intend that the payment of compensatory royalty during the extended term of a lease should further extend the term of the lease is also indicated by the legislative history of the 1946 amendment to section 17. When S. 1236, 79th Congress, which became the act of August 8, 1946, was introduced, the language proposed for inclusion in section 17 provided, *inter alia*, that noncompetitive leases should be "for a period of five years" and that the payment of compensatory royalty should "continue in effect the term of any lease." This language could readily have been construed to cover not only the 5-year term of a lease but also any extensions of the lease. However, when the bill was reported in the Senate on July 6, 1945, both provisions had been rewritten in their present form to include the adjective "primary" in connection with the word "term." This clearly limited the scope of the compensatory royalty provision to the term denominated as "primary" elsewhere in the section. There is nothing in the hearings, committee reports, or debates on the bill to throw any additional light on the change.

The foregoing discussion establishes beyond much doubt that, so far as the present language of section 17 is concerned, "primary term" means only the initial 5-year period. Roy's lease, however, was issued under section 17 prior to the enactment of the present language of the section. Section 17 then provided that noncompetitive leases "shall be for a period of five years and so long thereafter as oil or gas is produced in paying quantities." However, it contained no provision for lease extension by the payment of compensatory royalties. Hence, notwithstanding the fact that section 17, as it stood at the time of the issuance of Roy's lease, did not use the phrase "primary term," it seems entirely reasonable, in applying the new compensatory royalty extension provision to Roy's lease and other leases issued under old section 17, to construe "primary term" as meaning only the initial 5-year term of those leases.

For the reasons given, it is my opinion that "primary term," as used in the compensatory royalty provision of section 17, does not include the extensions granted by the acts of 1943, 1944, and 1945, and therefore that Roy is not entitled to an extension of his lease beyond December 31, 1946, by continuing to pay compensatory royalties. I realize that the view of section 17 here taken is inconsistent with the Department's regulation on compensatory royalty (43 CFR 192.8) insofar as

the latter defines primary term to mean the initial 5-year term and the 5-year extension authorized by section 17. I believe that this provision in the regulations is erroneous, and I recommend that it be eliminated or amended.<sup>3</sup>

If, as you suggest, policy considerations make it advisable that leases such as Roy's be extended upon the payment of compensatory royalties, you will doubtless wish to draft and recommend legislation to take care of the situation.

MASTIN G. WHITE,  
*Solicitor.*

### ADMINISTRATIVE ADJUSTMENT OF TORT CLAIMS WHEN DAMAGE IS COVERED BY INSURANCE

#### Damage Claims—Payment—Insurance—Subrogee—Bureau of Reclamation.

Where an insurance company informs claimant that it will not make payment for damage, the Department may pay such a claim, if it is otherwise meritorious, since there is no danger that the claimant will be compensated twice or that the Department will be required to make a second payment to the insurance company on the same claim.

The claim of an insurance subrogee is recognized where actual payment for the damage or a portion of it has been made by the insurance company under a legal duty to the owner of the damaged property.

The fact that damage is covered by insurance does not bar a right to payment under the Federal Tort Claims Act. If the claim is otherwise meritorious, it is paid to the insured if he has not collected from the insurance company, or to the insurance company to the extent that it has made payment to the insured.

M-34902

APRIL 9, 1947.

TO THE REGIONAL DIRECTOR, REGION 5, BUREAU OF RECLAMATION.

Your communication dated March 20 to the Commissioner of Reclamation, raising the question whether a claim should be paid by the Department under the Federal Tort Claims Act when the liability of the Government for the damage is clear but the damage is covered in whole or in part by insurance and the insurance company refuses to make payment, has been referred to me for reply.

The Federal Tort Claims Act authorizes the settlement of "any claim against the United States." The claim of an insurance company as subrogee is recognized where actual payment for the damage or a portion of it has been made by the insurance company under a legal duty to the owner of the damaged property. *Columbia Electric & Manufacturing Company and National Automobile Insurance Company, Subrogee*, Solicitor's opinion, December 12, 1946, M-34513;

<sup>3</sup> Provision deleted on July 24, 1947. (See 43 CFR, 1947 Supp., 192.8.) [Editor.]

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*Century Insurance Company, Ltd., Subrogee*, Solicitor's opinion, January 8, 1947, M-34533. Thus, the fact that damage is covered by insurance does not bar a right to payment under the Federal Tort Claims Act. If the claim is otherwise meritorious, it is paid to the insured if he has not collected from the insurance company, or to the insurance company, to the extent that it has made payment to the insured.

A statement in a claim indicating that the damage is covered in whole or in part by insurance puts the Department on notice that the rights of a subrogee may be involved. Therefore, before such a claim is paid, the claimant should be required to inform the Department whether he has placed a claim with the insurance company, and, if so, what disposition the insurance company has made of his claim.

Answering your question specifically, where the insurance company informs the claimant that it will not make payment, the Department may pay such a claim, if it is otherwise meritorious, since there is no danger that the claimant will be compensated twice because of the same damage or that the Department will be required to make a second payment (i. e., to the insurance company) on the same claim.

MASTIN G. WHITE,  
*Solicitor.*

**MRS. MAY E. BURT**

**A-24539**

*Decided April 17, 1947*

**Abandoned Military Reservations—Public Sale.**

The laws pertaining both to the sale of abandoned military reservation lands and to the public sale of isolated tracts authorize, but do not require, the Secretary of the Interior to dispose of any land.

**APPEAL FROM THE BUREAU OF LAND MANAGEMENT**

Mrs. May E. Burt has stated that she does not understand a decision of the Bureau of Land Management which rejected her application, accompanied by a tender of the purchase price, to buy at private sale lands on Lopez Island, San Juan County, Washington. The lands constitute a portion of the abandoned Washington Harbor Military Reservation, and under the provisions of the act of July 5, 1884 (23 Stat. 103; 43 U. S. C. secs. 1071-1074), they may be sold at private sale at not less than their appraised value, nor less than \$1.25 per acre, if they have been twice offered for public sale without bidders. Because her application was complete, Mrs. Burt asks the Department to review the action of the Bureau of Land Management which rejected her application in favor of a public sale of the lands under the

provisions of section 14 of the Taylor Grazing Act (48 Stat. 1274; 43 U. S. C. sec. 1171), as amended.

The lands involved are two small isolated tracts, the only lands remaining unpatented on this small island. All the other lands on the island are privately owned and most of them are devoted to agricultural purposes. No reason appears why the lands Mrs. Burt desires to purchase should be retained by the United States.

The only issue involved, therefore, is the manner in which the sale shall be made. Mrs. Burt's application is filed under the act of July 5, 1884, *supra*, which permits the lands to be sold to her at private sale. Section 14 of the Taylor Grazing Act, *supra*, on the other hand, permits the offering of the lands at public sale, where Mrs. Burt, along with all other interested persons, may bid for the tracts; section 14, however, affords a preference right to contiguous landowners to acquire the lands offered by meeting the highest bid price, but not more than three times the appraised price, within not less than 30 days after bids have been received. The language of both statutes is merely permissive in character.<sup>1</sup> They authorize, but do not require, the Secretary to dispose of land under them. The Secretary of the Interior, in the exercise of his discretion on behalf of the public interest, may determine that the lands ought not to be sold or he may elect to dispose of them under either of these two statutes, among others. *Henry W. Parrott*, A-24363, August 19, 1946 (unreported).

In this instance, there is no reason why the lands should not be sold. But where, as here, it is not unlikely that contiguous landowners may desire to purchase the lands, the Department favors the public sale rather than the private sale in order that all interested persons may have an opportunity to acquire the lands; that contiguous landowners may have an opportunity to exercise the preference right conferred upon them by section 14 of the Taylor Grazing Act; and that the return to the United States may be as large as the land market warrants within reasonable bounds.

The decision of the Bureau of Land Management therefore is affirmed without prejudice to any application Mrs. Burt may file to acquire the lands involved at a public sale under section 14 of the Taylor Grazing Act, *supra*.

WARNER W. GARDNER,  
*Assistant Secretary.*

<sup>1</sup> As to lands in abandoned military reservations, "the Secretary of the Interior may sell the same at private sale, for cash \* \* \*." 23 Stat. 103; 43 U. S. C. sec. 1072. [Italics supplied.]

As to section 14 of the Taylor Grazing Act, "it shall be lawful for the Secretary of the Interior to order into market and sell at public auction \* \* \* any isolated or disconnected tract or parcel of the public domain not exceeding seven hundred and sixty acres *which, in his judgment, it would be proper to expose for sale* \* \* \*." 48 Stat. 1274; 43 U. S. C. sec. 1171. [Italics supplied.]

## H. R. SCIVALLY

A-24569

*Decided April 17, 1947***Oil and Gas—Mineral Reservations Under Louisiana Law.**

Under Louisiana law the reservation by a vendor of mineral rights in lands sold creates only a servitude in the land which is extinguished if not exercised by the vendor within 10 years, even though the reservation is expressly made for periods in excess of 10 years.

**Mineral Reservations in Louisiana Acquired Lands—Terms of Purchase by Department of Agriculture.**

In view of assurances from the Department of Agriculture that that Department interpreted the Louisiana law of servitude as being inapplicable to mineral reservations made by vendors of land to the United States, and that the Department contracted for the purchase of land on the basis that the vendors could reserve the minerals for over 10 years and assured such vendors that such reservations would be honored for the full period, this Department will give recognition to the mineral reservations for their full period.

**MOTION FOR REHEARING**

On January 20, 1947, the Department approved a decision of the Bureau of Land Management rejecting the application of H. R. Scivally for a lease on a future interest in oil and gas in 560 acres of acquired land situated in Claiborne Parish, Louisiana. Scivally has filed a motion for rehearing.

The land in question was purchased by the United States through the Department of Agriculture. In the deed of conveyance, executed on February 2, 1938, the vendors reserved for a period of 25 years from May 28, 1936, the right to all minerals in the land. On May 22, 1946, the vendors executed a lease of the oil, gas, and other minerals to Scivally for a term of 10 years and so long thereafter as minerals should be produced. The lease was placed in escrow pending title examination.

On June 24, 1946, Scivally filed with the Department of Agriculture for execution by the Secretary of Agriculture an agreement that at such time as the mineral rights would vest in the United States, the Secretary would issue to Scivally, his successors or assigns, an oil, gas, and mineral lease "to be of such character and with such terms and conditions as those set forth in the oil, gas and mineral lease" executed by the vendors. Scivally said that unless he could secure the agreement, it would not be feasible to accept the vendors' lease and to make heavy expenditures and engage in drilling and other exploratory activities. Pursuant to section 402 of Reorganization Plan No. 3 of 1946, the case was transferred to this Department for action.

In the decision of January 20, Scivally's request was treated as an application for a future lease pursuant to regulations of the Depart-

ment of Agriculture (7 CFR, 1944 Supp., 4.9). The regulations provide that where the United States owns a future interest in oil or gas, the Secretary may, "where it is deemed in the public interest," enter into an agreement for the issuance of an oil and gas lease at some future time. The execution of an agreement with Scivally was not deemed to be in the public interest primarily for the reason that it might defeat the vesting of the mineral rights in the United States on February 2, 1948. Such vesting was deemed to be a possibility under the Louisiana law of servitudes or prescription which was fully discussed in the decision. Briefly, the Louisiana law is that the reservation of minerals in a conveyance creates only a servitude in the land which is extinguished if not exercised within 10 years of its creation. This is so notwithstanding that the reservation is expressly made for periods in excess of 10 years. In this case, therefore, it was thought that the mineral rights would pass to the United States if not exercised by February 2, 1948. Reference was made to a 1940 Louisiana statute (Act 315, La. Stats., 1940) which purports to render mineral reservations in conveyances to the United States "imprescriptible," i. e., not subject to the law of servitudes. It was held that this statute could not be given retroactive effect and that it would be invalid if so applied.

In his motion for rehearing, Scivally contends that the 1940 act is applicable. He then urges that as a matter of policy the United States should "ratify" his lease.<sup>1</sup> He suggests that if such action is not taken, the operator of the lease will take out as much oil and gas as he can during the 14 years remaining of the mineral reservation and that such uncontrolled production will not be in the public interest. Aside from this, he states that when the land acquisition program was undertaken by the United States, Government agents advised the landowners that their mineral rights would be preserved for the full period of reservation and that the United States would not invoke the law of prescription to defeat these rights.

The Assistant Secretary of Agriculture, in a letter to this Department dated April 3, 1947, has verified this last statement. He states that his Department interpreted the law of prescription as being inapplicable to reservations made by the Government's vendors in conveyances to the United States, and that under this interpretation the Department contracted for land on the basis that the vendor could reserve the minerals for a period of over 10 years and gave assurances that such reservation would be honored for the full period. The

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<sup>1</sup> Not only in the motion for rehearing but in several letters received from Scivally's attorneys from time to time, the request is made that Scivally's lease with the vendors be "ratified." Apparently by "ratification," Scivally means the execution by the United States of an agreement to issue him a future lease. The United States has no control over the leasing by the vendors of the mineral interests which they have reserved, and no approval or ratification by the United States is required to make such leases effective.

*April 21, 1947*

interpretation referred to was apparently that set forth in opinions of the Solicitor of Agriculture (Op. Sol. No. 4943, March 25, 1944; No. 13845 Old Series, September 4, 1935; and letter of May 4, 1935, to Regional Law Officer Murphy at Atlanta, Georgia).

In view of this information, which was not available to this Department at the time the decision of January 20 was rendered, the Department will recognize the mineral reservation of the vendors as being in effect for the full period of 25 years. This renders unnecessary any further consideration of the effect of the 1940 Louisiana statute. Since the primary ground for rejecting Scivally's application has thus been removed, a reconsideration of the facts will be necessary to determine whether it will be in the public interest to enter into an agreement now to issue him a lease effective in the future. The case is, therefore, remanded to the Bureau of Land Management for the determination of this question and for appropriate action, to be approved by the Department.

WARNER W. GARDNER,  
*Assistant Secretary.*

WILLIAM H. HOLST

A-24416

*Decided April 21, 1947*

**Public Sale—Purchase of Mountainous Tract—Section 14 of Taylor Grazing Act—Use of Improper Application Form.**

Although executed on form governing sales of isolated tracts, application held sufficient as an application for a mountainous tract under the particular facts of the case, in which the supporting affidavit emphasized the mountainous character of the land and in which the Land Office, in a previous decision, had characterized the application as an application for a mountainous tract and had suggested its refileing.

**Sale of Land—Public Interest.**

Sale of land held to be in the public interest where it is public land extending into a general area of privately owned land, but only if the purchaser also buys certain additional public lands in order to prevent the isolation of such lands by surrounding privately owned lands.

**APPEAL FROM THE GENERAL LAND OFFICE<sup>1</sup>**

On September 28, 1935, William H. Holst filed a public-sale application, Great Falls 081850, under section 14 of the Taylor Grazing Act (48 Stat. 1274; 43 U. S. C. sec. 1171), for lots 1, 3, 5, NW $\frac{1}{4}$ NE $\frac{1}{4}$

<sup>1</sup> Effective July 16, 1946, the General Land Office and the Grazing Service were abolished and their functions were transferred to the Bureau of Land Management, by Reorganization Plan No. 3 of 1946 (11 F. R. 7875, 7876; 7776).

sec. 14, T. 5 S., R. 4 W., P. M., Montana. The application was executed on the form governing purchases of isolated tracts. Holst stated in the application that he was the owner of adjoining land. On October 21, 1935, he submitted an affidavit in which he alleged that "the land applied for in said isolated tract application No. 081850 is rough, and mountainous and is unfit for cultivation."

On February 19, 1936, the Assistant Commissioner of the General Land Office rejected the application, on the ground that at the time it was filed public sale of the land was precluded by the first general order of withdrawal (Executive Order No. 6910, November 26, 1934). Since the Executive order had been amended on November 26, 1935, so as to permit sales under section 14 of the Taylor Grazing Act, the Commissioner's rejection, however, was without prejudice to applicant's right to have his application considered as a new application for the public sale of the lands. The Commissioner specifically described Holst's application as an "application \* \* \* under the second proviso to section 14 of the Taylor Grazing Act," and emphasized Holst's allegation that the land applied for is rough and mountainous, and unfit for cultivation.

In accordance with the Commissioner's decision, Holst requested, on March 12, 1936, that the papers originally submitted be considered as a newly filed application. Investigation was made of the land. On May 26, 1944, the Assistant Commissioner rejected the application for the reason that the land is not isolated by location or use from the other public lands in the township, and that its disposal would be contrary to the public interest since it can be properly utilized and administered under Federal ownership in connection with other public lands in the area. However, the Assistant Commissioner added that apparently the applicant is primarily interested in the land for a residence site, and that the rejection of his application would be without prejudice to the filing of an application under the Five-Acre-Tract Act of June 1, 1938 (52 Stat. 609; 43 U. S. C. sec. 682a).

William H. Holst had died in the meantime, and Emma A. Pomrenke filed an appeal as the administratrix of his estate. An additional field examination was made in order to obtain data for determining the proper disposition or use which should be made of the land. Following an extensive investigation, the appeal was transmitted to the Department on August 20, 1946. Thereafter, a reexamination was made of the question whether the public interest requires retention of the land in public ownership.

The present application is sufficient as an application under the second proviso of section 14 of the Taylor Grazing Act, i. e., for a tract of land which is mountainous or too rough for cultivation. Al-



*April 21, 1947*

though the application was executed on the form governing sales of isolated tracts, it should be noted that the supporting affidavit which the applicant submitted in accordance with the regulations (43 CFR 250.3), emphasized that the land is rough, mountainous, and unfit for cultivation. In particular, the Land Office decision of February 19, 1936, rejecting the application but suggesting its refile, characterized it as an application under the second proviso of section 14 of the Taylor Grazing Act and called attention to the fact that the land is mountainous and unfit for cultivation. The Land Office thus regarded the application as one for a mountainous tract. Pursuant to the suggestion of the Land Office, the same papers originally submitted were refiled on March 12, 1936. They meet all requirements of an application for a mountainous tract, and they quite clearly were intended and should be regarded as such. Under the express provisions of the statute, a mountainous tract need not be isolated, and the Land Office erred in rejecting the application on the ground that it is not isolated.

Reexamination of the nature and location of the land has shown that no particular public interest requires retention of the land in public ownership, since it is public land extending into a general area of privately owned land. However, the public interest demands that, if the land is sold, the purchaser also buy lots 4 and 6 of the same section, lying on the opposite side of an adjoining mining claim which is patented to the applicant. For otherwise a narrow neck of public land would remain, protruding into privately owned land.

Consequently, the decision of the Land Office is reversed, and the appellant given an opportunity to amend his application, within 30 days from receipt of notice of this decision, so as to include lots 4 and 6 of section 14. If appellant should fail so to amend his application, it is hereby rejected for the reason that a sale of the lands now applied for would be contrary to the public interest. The rejection would be without prejudice to appellant's right to file an application under the Five-Acre-Tract Law, *supra*. It should be noted, however, that in case of a disposition under that law, veterans of World War II may have a preference right over the appellant (section 4 of the act of September 27, 1944, 58 Stat. 748; 43 U. S. C. sec. 282).

The case is remanded to the Bureau of Land Management for further proceedings in accordance with this decision.

WARNER W. GARDNER,  
*Assistant Secretary.*

**ZELPH S. CALDER, APPELLANT**

v.

**WILSON MURRAY ET AL., INTERVENERS****A-24397***Decided April 23, 1947***Authority of Director of Grazing Service—Examiner Resigning Before Rendering a Decision.**

Under the regulations in force in March 1946 (43 CFR 501.9 (i)), the examiner either had to make findings of fact and render a decision himself, or could submit a proposed decision to the Secretary upon whose approval it would become the decision of the Department; and if the examiner resigned before issuing a decision, the Director of the Grazing Service, who had no function in the appellate process involving grazing matters, had no right to issue a decision on the basis of the hearing before the examiner.

**Scope of Examiner's Decision—Framing of Issues—Additional Grazing Privileges and Existing 10-Year Permit.**

While, when appealing to an examiner, an applicant may not restrict the issues, fairness requires that if additional issues are considered the examiner so state, in accordance with 43 CFR 501.9 (g), so that, unless the issues are specifically widened, questions involving the impropriety of an existing 10-year permit may not form the basis of a decision concerning the grant of additional grazing privileges.

**Seasonal Use of Range.**

Questions as to the seasonal use of the range are matters peculiarly for consideration by the local officials.

**Advisory Board—Bias of Member—Section 18 of Taylor Grazing Act.**

Section 18 of the Taylor Grazing Act (53 Stat. 1002; 43 U. S. C. sec. 3150-1) expressly provides for an advisory board of "local stockmen" (see, also, 43 CFR 501.12), and there is no showing in the case to substantiate the claim of bias or impropriety on the part of one of the members.

**APPEAL FROM THE GRAZING SERVICE<sup>1</sup>**

Zelph S. Calder has appealed from a decision of the Acting Director of Grazing, styled "Findings of Fact and Decision of the Examiner," which affirmed a decision of the district grazier, Utah Grazing District No. 8 (Duchesne).<sup>2</sup>

<sup>1</sup> Effective July 16, 1946, the General Land Office and the Grazing Service were abolished and their functions were transferred to the Bureau of Land Management, by Reorganization Plan No. 3 of 1946 (11 F. R. 7875, 7876; 7776).

<sup>2</sup> Notice of intention to appeal to the Secretary was filed in this case on March 25, 1946, and the appeal perfected on June 24, 1946. Section 9 (j) of the Federal Range Code, as then in force, provided for an appeal to the Secretary from decisions of an examiner. By Circular 1630 of December 11, 1946 (11 F. R. 14496), the Federal Range Code was revised to provide for appeals from decisions of examiners to the Director of the Bureau of Land Management (43 CFR 161.9 (j)), subject to any further appeal to the Secretary of the Interior (43 CFR 161.9 (m)). Since the appeal to the Secretary was filed in the present case before the issuance of Circular 1630, it is decided by the Secretary in accordance with the appeal procedure in effect at that time. In any event, even if the new appellate procedure were deemed applicable, the Secretary, of course, has authority to decide any matter, irrespective of the fact that regulations provide for an intermediate appeal. 43 CFR 221.83; *West v. Standard Oil Co.*, 278 U. S. 200, 213 (1929).

*April 23, 1947*

Utah Grazing District No. 8 was established on June 22, 1935. Appellant's first application for grazing privileges was filed on July 25, 1935, and he has been granted certain grazing privileges for his livestock in Units B and C of the grazing district each year since 1935. The present appeal arises out of an application by appellant for additional grazing privileges. He holds a 10-year permit issued to him on January 10, 1943. On February 26, 1945, he sent a letter to the Grazing Service, requesting adjustment of that permit. The permit assigned to him is for 60 cattle each year on Unit B from April 16 to May 15, and November 1 to December 31, and for 140 cattle, during the same periods each year, on Unit C. In his letter, he requested transfer of the 60 cattle from Unit B-winter to Unit C-winter, and at the same time asked that the time of the permit for Unit C-winter be specified as November 1 to April 30. In another letter, also of February 26, 1945, appellant protested the use of the Unit C cattle division during the month of May, alleging that that month is the main growing season for the winter feed. In addition, he filed an application on March 19, 1945, requesting, besides other privileges, a permit to graze 140 head of cattle on Unit C-winter from April 1 to May 1, and November 1 to December 31, 1945.

While approving the other requests made by appellant in his March 19 application, the district grazer, on March 29, 1945, rejected the application with respect to the grazing of 140 cattle on Unit C-winter for the period April 1 to April 15, for the reason that such use would be detrimental to the Federal range and would adversely affect other licensees and permittees. Appellant's request to use the Federal range in Unit C cattle allotment for a 6 months' period during the winter was also denied. The grounds for that denial were (a) more than 2 years of nonuse had expired since 6 months' use had been applied for, used, or granted; (b) no sufficient range or forage available for any other class of livestock except class 1; and (c) such use would adversely affect other permittees and would be detrimental to the Federal range.

Finally, the district grazer rejected appellant's protest against the use of Unit C cattle allotment during the month of May, on the grounds that it had been previously determined by the Grazing Service and the advisory board that the month of May is a part of the proper grazing season and that to eliminate use during that month would seriously affect the other permittees.

Calder appealed the decision of the district grazer. He urged that he has run between 50 and 250 head of cattle for the last 15 years in the vicinity; that his father, O. B. Calder, together with his three sons—the appellant, Leo and Mentzer—grazed about 2,000 head of sheep during the winter seasons for not less than 15 years prior to

1934 on what is now known as Unit C-winter and B-winter; that since the organization of the grazing district appellant has been granted a permit to run 200 head of cattle on the Federal range, or the equivalent in sheep, except as temporarily reduced in certain ways; and that he never acquiesced in a permanent permit for less than 200 cattle, 6 months' winter use, but on the contrary was informed by the Grazing Service that the 3 months' winter use was only temporary. He stated that he has paid his grazing fees "for the last past seven or eight years and has received very little use of the Federal range"; that it has been his plan, because of the Grazing Service policy of changing the allotment of Federal range from sheep to cattle, also to change from sheep to cattle and "run his cattle on the public domain during the winter months the same as sheep are run"; and that he has "no private ground to care for his cattle during the winter months (except a twenty-acre pasture)," so that to "deprive" him of the Federal range during part of the winter season would force him to lease winter pastures and buy feed at prohibitive prices.

A hearing was held before Perry T. Williams, as examiner, on September 12, 1945. At the beginning of that hearing, the examiner announced that the parties had stipulated the issues in the case to be as follows:

1. Whether the appellant is qualified and eligible from his base properties, personal qualifications, and within the provisions of the Federal Range Code, to receive a license or permit for the grazing of 140 cattle in Unit C and 80 cattle in Unit B for the full winter grazing season of 6 months, being from November 1 to April 30 each year; and

2. Whether the classified use of the Federal range in Unit C for the month of May each year should be rescinded and that range closed to all present users during the month of May.

Certain licensees and permittees of the Federal range in Unit C were recognized as interveners. Described lands were stipulated by the parties to be the base properties of the appellant for the grazing privileges requested. The parties stipulated that "there is with the file of the appellant a copy of the 10-year permit issued to him by the Grazing Service on January 10, 1943, which permit has at all times since its issuance remained in good standing." At the opening of the hearing, District Grazier Dale C. Naylor, who represented the Grazing Service at the hearing, stated his position as follows:

My contention is that the adjudication of grazing privileges made by former district graziers in this district substantially represent the maximum qualifications of the appellant from his base properties, particularly the grazing privileges specified in the 10-year-term permit issued to this appellant on January 10, 1943, as accepted and countersigned by him at that time.

Mr. Naylor further referred to the reasons, set forth above, of his rejection notice of March 29, 1945, and summed up his position by

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stating as his contention "that the livestock operations of the appellant have heretofore been stabilized and that any additional use of the Federal range by the appellant would be in excess of his qualifications under the general provisions of the Federal Range Code."

Most of the testimony at the hearing was concerned with the second issue stated by the examiner, namely, whether the Federal range in Unit C should be closed to all users during the month of May, and in lieu thereof be reclassified as suitable for use during the period April 1 to April 15 each year, in accordance with appellant's petition. Of the other testimony, some portion was devoted to the question whether appellant used the Federal range during the priority period with cattle. That portion of the testimony, however, is irrelevant because later in the course of the hearing appellant stated specifically that he bases his class 1 priority claim on the use of the land during the priority period with sheep, not with cattle. Almost all the evidence taken at the hearing concerning sheep operations related to the operations carried on by appellant's father and brother, O. B. and Leo Calder.

The examiner, Mr. Williams, himself did not render any decision. At the time of the decision here appealed from (March 13, 1946), he was no longer in office. The decision of March 13, though styled "Findings of Fact and Decision of the Examiner," was signed by the Acting Director of Grazing. The decision ruled that it is the conclusion and decision "of the examiner" that appellant does not own or control base properties which would qualify him to receive a license or permit for the grazing of 140 cattle upon the Federal range in Unit C and 60 cattle in Unit B for the full winter grazing season, November 1 to April 30. It was stated to be the further conclusion and decision "of the examiner" that there is insufficient evidence to support appellant's petition to close the range during May and to reclassify it as suitable for use during April 1 to April 15 each year.

The first conclusion of the decision was predicated upon the following reasons:

(a) There is a presumption that the grazing privileges conferred by the permit issued on January 10, 1943, represented the maximum grazing privileges the appellant was qualified to receive. It was not until more than 2 years thereafter that he applied for additional grazing privileges, and no additional base properties had been acquired by him in the meantime.

(b) Appellant was not qualified to receive a license or permit for any grazing privileges upon the Federal range on January 10, 1943, in that he did not possess sufficient land or water to insure a year-round operation as required in section 1 (a) of the Federal Range Code.

(c) Since appellant did not graze his cattle during the winter months upon public domain that is now within an established grazing district, his properties are not dependent by use, within the meaning of section 2 (g) of the Federal Range Code, by reason of his own livestock operations during the priority years, except for a small amount of Federal range used by him during the summer months. The sheep operations conducted by O. B. and Leo Calder do not result in making appellant's properties "lands dependent by use."

The decision based its second conclusion upon the established doctrine that classifications as to the seasonal use of ranges are clearly matters for consideration by the advisory board and the local administrative officers of the Grazing Service, and that their action will not be disturbed unless irregularities are shown warranting disapproval. Finally, it directed the district grazer to reconsider the facts showing that the permit of January 10, 1943, was improperly issued, and, if it appears appropriate to him, to take action with a view to canceling the permit to the extent to which it was issued improperly.

In his appeal to the Secretary, Calder urges that the examiner's decision is based upon facts immaterial to the issues upon which appellant appealed from the district grazer to the examiner, and that it puts in issue his long-established 10-year permit which is not subject to review in this proceeding. He contends that the examiner committed prejudicial error in some of his findings of fact, and that it was prejudicial and unfair to appellant's substantial rights to have Mr. H. E. Seeley, a permittee in Unit C-winter and president of the Ashley Cattle Growers Association, sit as a member and president of the advisory board which heard and determined appellant's application for a 6 months' cattle permit for 200 head on the Federal range. Appellant also alleges that originally he had a 6 months' winter permit on the range, and accepted the limited 10-year permit only under the apprehension and on the condition that he would be permitted to apply for a different and greater use of the Federal range later. He asserts that it had never been his contention that any sheep permit of O. B. or Leo Calder had been transferred to him, but that the "records show from the inception that appellant has a sheep permit along with his cattle permit."

The decision of March 13, 1946, was not rendered in accordance with the procedure then specified in 43 CFR 501.9 (i). That provision read as follows:

(i) *Findings of fact and decision by examiner; notice; submission to Secretary of the Interior.* As promptly as possible following the conclusion of the hearing the examiner will make findings of fact and render a decision, which shall become a part of the record in any appeal, and a copy of which shall be sent by registered mail to the appellant and all interveners: *Provided, however,* That the examiner may, before promulgating a decision, submit it to the Secre-

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tary of the Interior for consideration. Upon approval by the Secretary, it shall constitute the decision of the Department, without prejudice to the right of any party affected to be furnished with a copy of the transcript of testimony, as provided in the next paragraph, and to move for a rehearing in the manner prescribed by the Rules of Practice of the Department then in effect.

Clearly, under the regulation either the findings of fact had to be made and the decision rendered by the examiner, i. e., the person who conducted the hearing (see 43 CFR 501.9 (g)), or he could submit a proposed decision to the Secretary, upon whose approval it would become the decision of the Department. Under those regulations, the Director of the Grazing Service, as such, was given no function in the appellate process involving grazing matters. As is indicated by a memorandum in the file, the Director of the Grazing Service apparently felt that section 9 of the Federal Range Code (43 CFR 501.9) permitted him to issue and sign the decision in the circumstances, "as the examiner presides at a local hearing as the representative of the Director and actually hears the case on a bureau level for the Director." The Department does not share that view. The provisions of 43 CFR 501.9 were specific; an appeal was allowed from a decision of the district grazer to an "examiner" of the Grazing Service (501.9 (c)); the hearing was to be conducted before the "examiner" (501.9 (g)); and the decision was to be made by the "examiner" (501.9 (i)).<sup>3</sup> Procedural requirements of such a nature should not be interpreted loosely or disregarded.<sup>4</sup> The action of the Director was not authorized by and is inconsistent with the regulations.<sup>5</sup> And while in a proper case the Secretary may waive the provision of a regulation (see, also, footnote 2, *supra*), the Director

<sup>3</sup> Or a proposed decision could be submitted to the Secretary for approval. See 501.9 (i), *supra*.

<sup>4</sup> While the decision of March 13, 1946, was rendered before the enactment of the Administrative Procedure Act of June 11, 1946 (60 Stat. 237), it may nevertheless be appropriate to refer to that act and to the new regulations governing grazing appeals, which were issued in order to conform the procedures to the mandates of the act. 43 CFR 161.9 (1)—which supersedes 43 CFR 501.9 (i)—authorizes the Director of the Bureau of Land Management to require, in specific cases, that the examiner make only a recommended decision and submit it, together with the record, to the Director for consideration. This provision implemented section 8 (a) of the Administrative Procedure Act which, with exceptions not here relevant, provides that "Whenever the agency makes the initial decision without having presided at the reception of the evidence, such officers [hearing officers] shall first recommend a decision." Apparently, under the provisions of 43 CFR 161.9 (i) and section 8 (a) of the Administrative Procedure Act, a person who is completely outside the specified hierarchy of an appellate process (as the Director of the Grazing Service was in the case at hand) may not arrogate to himself the right to render a decision on the basis of a hearing conducted by an examiner. And to that extent, 43 CFR 501.9 (i) should not be interpreted differently. Sections 501.9 (i) and 161.9 (i) do not differ materially in that particular regard.

<sup>5</sup> The decision of March 13, 1946, is held defective because of inconsistency with a specific regulation. The question to be determined therefore is not whether the action of the Director deprived appellant of a "hearing" as required by statute. See section 9 of the Taylor Grazing Act (48 Stat. 1273; 43 U. S. C. sec. 315h). The doctrines announced by the Supreme Court in the Morgan cases (*Morgan v. United States*, 298 U. S. 468 (1936); 304 U. S. 1; 304 U. S. 23 (1938)) thus are not in point.

of the Grazing Service had no such authority with respect to the procedural provisions of the Range Code. Nor is it believed that in a controversial matter like the present the Secretary should now attempt to waive a regulation which assures consideration of a record by the very person who conducted the hearing.

Apart from this defect, there is a further objection to the decision of March 13, 1946. Appellant, who holds a 10-year permit issued on January 10, 1943, appealed from a decision of the district grazier which rejected his application for additional grazing privileges. In accordance with the provision of 43 CFR 501.9 (g)<sup>6</sup> the parties stipulated the issues. It would seem that in connection with its first conclusion the decision went beyond the issues stipulated by the parties. Only the first issue, i. e., the question whether appellant is qualified to receive a license or permit for the grazing of 140 cattle in Unit C and 60 cattle in Unit B for 6 months during the winter season, has any relevance here.<sup>7</sup> But, as framed by the examiner, that issue did not call into question the propriety of the existing 10-year permit which had been granted to the appellant. True, it has been settled by the Department that when appealing to an examiner an applicant may not restrict the issues to those included in the scope of his appeal. *Joseph F. Livingston et al.*, A. 22362, December 18, 1939 (unreported), motion for rehearing denied. The Department stated in that case that an appellant—

\* \* \* is on notice of the fact that the hearing may even result in the introduction of evidence that will warrant the reduction of the license that has already been granted, for the Federal Range Code, in section 9, paragraph g, provides not only that at the time of the hearing the appellant, the regional grazier, and the recognized interveners shall stipulate as far as possible all material facts and the issue or issues involved, but also provides that "The examiner will state any other issues on which he may wish to have evidence presented \* \* \*." Thus an appellant must realize when he files an appeal that he cannot restrict the scope of the hearing to a particular issue which he desires to raise, but that he must be prepared to defend, in whole or in part, the license that has been issued, if it appears to the examiner that there is any reasonable doubt as to the sufficiency of the showing upon which it is based.

But, while the issues may not be restricted, fairness requires that if additional issues are considered, the examiner so state in accordance with section 501.9 (g). Here the examiner never indicated that he

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<sup>6</sup> As far as here relevant, that section provided: "The appellant, the district grazier, and recognized interveners will stipulate as far as possible all material facts and the issue or issues involved."

<sup>7</sup> The second conclusion in the decision, viz, the determination of the seasonal use of the range, corresponds to the second issue as stated by the examiner, and may be disregarded for present purposes. Questions as to the seasonal use of the range are, of course, peculiarly matters for consideration by the local officials. 43 CFR 501.12 (i) (5); 501.5 (a). *George Magnuson*, A. 23211, March 7, 1942. Cf. *Elmer Nielson*, A. 24107, July 5, 1945; *Howard Lathrop*, A. 23242, March 21, 1942 (all unreported).



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wished to hear evidence on the propriety of the existing grazing permit. The provision of 43 CFR 501.9 (g) established a procedure for introducing additional issues, and if that procedure was not followed, the decision should not have gone beyond the issues stated by the examiner. And although the decision actually ruled only that appellant was not entitled to additional grazing privileges, the reasons stated in the opinion show that the Director strongly relied on his view concerning the impropriety of the original permit. In fact, two of the three reasons advanced as bases for the Director's conclusion, i. e., the reasons listed, *supra*, in the statement of facts as (b) and (c), were addressed directly to the original permit. Thus, the Director stated that appellant did not on January 10, 1943, have a "year-round operation" as required by section 1 (a) of the Federal Range Code, and that his properties were not "dependent by use," within the meaning of section 2 (g) of the Federal Range Code. With respect to the first question, it may be noted that the Director specifically found that "the evidence does not disclose where and how these cattle have been maintained during the winter months." That finding may be supported by the evidence, but it suggests that in the hearing the question as to a year-round operation was not properly placed in issue. Similarly, the second question, i. e., the broad issue as to whether the base properties are "land dependent by use," within the meaning of 43 CFR 501.2 (g), was not adequately covered at the hearing so as to permit a determination in the decision. In its broad implications, the question was not in issue at the hearing, and no clear evidence was received as to appellant's contention, emphasized on appeal, that he grazed sheep and had a sheep permit, independently of the permit issued to O. B. and Leo Calder. Without expressing any opinion as to the merits, the Department feels that these two reasons should not have been used by the Director to support his conclusion.

The Department believes that, under the circumstances, it need not determine whether the first reason given by the Director (listed under (a), *supra*, in the statement of facts) adequately supports his conclusion. The statement that the grazing privileges conferred by the permit of January 10, 1943, presumptively constitute the maximum to which appellant is entitled, is in itself not a strong argument and, in particular, is somewhat inconsistent with the clearly expressed view of the Director that appellant was not entitled to any permit whatever on January 10, 1943. Moreover, again without passing on the merits of the controversy, the Department feels that the treatment of that question by the Director failed to consider appellant's contention that he never acquiesced in a permanent permit for less than 200 cattle, but on the contrary was informed by the Grazing Service that the

3 months' winter use was only temporary. For the same reason, the conclusion of the Director does not seem to be adequately supported by his mere reference to the fact that it was not until more than 2 years after the issuance of the permit that appellant applied for additional grazing privileges. In any event, the Director's conclusion cannot be divorced from his emphasis on the alleged impropriety of the permit issued on January 10, 1943.

Finally, it should be noted that, although merely directing the district grazer to consider the institution of proceedings for cancellation of the permit (43 CFR 501.9 (d)), the reasoning in the Director's decision, if permitted to stand, would seem to prejudice the outcome of any such proceeding.

Aside from the fact that the Director should not have rendered any decision in the case (see, *supra*), it follows that the scope of his decision is objectionable.

The decision of March 13, 1946, is therefore vacated, and it becomes unnecessary to examine the various substantive issues raised on appeal. Only the contention concerning the alleged bias of Mr. Seeley, a member of the advisory board, need be considered. All the evidence in the case has been carefully examined in order to ascertain whether there is any substance to appellant's charges. Section 18 of the Taylor Grazing Act, as added July 14, 1939 (53 Stat. 1002; 43 U. S. C. sec. 3150-1), expressly provides for an advisory board of "local stockmen." See, also, 43 CFR 501.12. Nothing has been shown to substantiate the claim of bias or impropriety on the part of Mr. Seeley in performing his functions as a member of the advisory board. Cf. *Harvey Brothers v. U. Patton et al.*, A-24482, March 28, 1947 (unreported); see, also, *Mrs. Lurley Holcomb et al.*, A-23962, November 4, 1944 (unreported).

The case is remanded to the Bureau of Land Management which will arrange for appropriate action on Calder's appeal from the decision of the district grazer.

OSCAR L. CHAPMAN,  
*Under Secretary.*

#### WILLARD B. ARONOW

A-24584

*Decided April 23, 1947*

#### Oil and Gas Leases—Extension by Reason of Drilling Operations—Primary Term—Section 17 of Mineral Leasing Act.

The oil and gas lease extensions granted by the acts of September 27, 1944 (58 Stat. 755), and November 30, 1945 (59 Stat. 587), do not constitute a part of the primary term of the lease within the meaning of the provision in section 17 of the Mineral Leasing Act, as amended (60 Stat. 950), which

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grants a 2-year extension for leases which are within the known geologic structure of a producing field at the end of their primary term and upon which drilling operations are being prosecuted on such expiration date.

**APPEAL FROM THE BUREAU OF LAND MANAGEMENT  
APPEAL FROM THE OIL AND GAS SUPERVISOR, GEOLOGICAL SURVEY**

Willard B. Aronow is the holder by assignment of oil and gas lease, Great Falls 051979, the 5-year term of which expired on December 31, 1944. The owner of the lease at that time filed a preference-right application for a new lease under the act of July 29, 1942 (56 Stat. 726; 30 U. S. C. sec. 226b), but the application was rejected as to 238.58 acres because they were on the expiration date of the lease within the limits of an undefined addition to the known geologic structure of the Kevin-Sunburst field. The term of the lease as to those lands, however, was extended to December 31, 1946, by the acts of September 27, 1944 (58 Stat. 755), and November 30, 1945 (59 Stat. 587; 30 U. S. C. sec. 226b). Aronow became the owner of the lease by an assignment approved on August 21, 1946.

On December 23, 1946, the Geological Survey approved a notice of intention to drill a well on the lease. Because of severe weather and the inaccessibility of the drilling location, drilling operations were not commenced until December 31, 1946. On January 3, 1947, Aronow filed an affidavit that on December 31, 1946, the expiration date of the lease, a well was being diligently drilled on the lease, and he therefore applied for a 2-year extension of his lease pursuant to section 17 of the Mineral Leasing Act, as amended by the act of August 8, 1946 (60 Stat. 950; 30 U. S. C. sec. 226). His application was rejected on February 13, 1947, by the Director of the Bureau of Land Management on the ground that the 2-year extension provision in section 17 applies only to leases on which drilling is being prosecuted at the end of their primary term, and that Aronow's lease was not in its primary term on December 31, 1946. In the interim, for the same reasons, Aronow was ordered on January 24, 1947, by the District Engineer and the Oil and Gas Supervisor at Casper, Wyoming, to suspend his drilling operations. At that time the well had reached a depth of 5 feet.

From the decision and order Aronow has appealed to the Secretary and to the Director of the Geological Survey. Since both appeals involve the same question and one appeal is before the Department, the other appeal will also be disposed of in the same proceeding.<sup>1</sup> Aronow bases both appeals entirely upon the contention that the "primary term" of a lease means its fixed or exploratory period as distinguished from its producing period, and that it was this fixed

<sup>1</sup> See George C. Vournas, 56 I. D. 390 (1938).

or exploratory or primary term that Congress extended to December 31, 1946. Therefore, he contends, since there was diligent drilling on his lease at the end of its primary term, his lease comes within the extension provision of section 17.

The decision and order are in accordance with the Department's ruling of November 13, 1946. On that date, the Department advised John E. Cochran, Jr., attorney for the holder of lease, Las Cruces 064176, that the 2-year extension provision did not apply to that lease since it was no longer in its primary term. The 5-year term of the lease had expired on December 31, 1943, but had been extended to December 31, 1946, just as Aronow's lease. Since the Department's ruling was contained in a telegram and reasons for the ruling were not fully discussed, they will be set forth here.

The applicable provisions of section 17, as amended, read as follows:

\* \* \* Leases issued under this section shall be for a *primary term of five years* and shall continue so long thereafter as oil or gas is produced in paying quantities.

\* \* \* \* \*

Upon the *expiration of the primary term* of any noncompetitive lease maintained in accordance with applicable statutory requirements and regulations, the record titleholder thereof shall be entitled to a single extension of the lease, unless then otherwise provided by law, for such lands covered by it as are not on the *expiration date of the lease* within the known geological structure of a producing oil or gas field or withdrawn from leasing under this section.

\* \* \* Such extension shall be for a period of five years and so long thereafter as oil or gas is produced in paying quantities and shall be subject to such rules and regulations as are in force *at the expiration of the initial five-year term* of the lease. No extension shall be granted unless an application therefor is filed by the record titleholder within a period of ninety days prior to *such expiration date*. Any noncompetitive lease which is not subject to *such extension* in whole or in part because the lands covered thereby are within the known geologic structure of a producing oil or gas field *at the date of expiration of the primary term* of the lease, and upon which drilling operations are being diligently prosecuted on *such expiration date*, shall continue in effect for a period of two years and so long thereafter as oil or gas is produced in paying quantities. [Italics supplied.]

The last sentence clearly provides that the 2-year extension is to be granted only if (1) the lease is not entitled to a 5-year extension because it is on a producing structure at the "expiration of the primary term," and (2) the lease is being diligently drilled "on such expiration date." Both conditions must be met on the same date, namely, the "expiration of the primary term." To determine what that phrase means, it is necessary to ascertain as of what date the condition requisite to a 5-year extension must be fulfilled (i. e., that the leased lands are not on a producing structure), for it is only if that condition is not met on that date that a lessee is entitled to a 2-year exten-

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sion. The first and third sentences of the above quotation from section 17 establish beyond any reasonable doubt that the critical date is the expiration date of the *initial 5-year term of the lease*. Only if a lease is not on a producing structure on that date is it entitled to a 5-year extension. And only if a lease is not entitled to a 5-year extension because it is on such a structure on that date is it entitled to a 2-year drilling extension. It follows, therefore, that drilling must also be in progress on that date if the 2-year extension is to be obtained. Obviously, since the 5-year term of Aronow's lease expired on December 31, 1944, he cannot invoke his drilling at the end of the 7th year of his lease to meet the requirements for a 2-year extension.

As a matter of fact, Aronow's lease has had the benefit of extensions equivalent to the 2-year drilling extension. Under the act of July 29, 1942, *supra*, the holder of a 5-year noncompetitive lease was given a preference right to a new 5-year lease if his old lease was not on a producing structure *at the end of its 5-year term*. This is precisely the requirement now for a 5-year extension. Then the acts of December 22, 1943 (57 Stat. 608), and of September 27, 1944, and November 30, 1945, *supra*, provided that if a lease was not entitled to a preference right, i. e., because situated on a producing structure at the end of its 5-year term, the term of the lease would be extended to December 31, 1946. This extension was obviously the equivalent of the new 2-year drilling extension except that no drilling requirement was attached. Pursuant to these acts, Aronow's lease was extended from December 31, 1944, to December 31, 1946, precisely 2 years.

For the reasons given, it is plain that Aronow's lease was not in its primary term on December 31, 1946, and that he is, therefore, not entitled to a 2-year extension by reason of the drilling being prosecuted on that date.<sup>2</sup> Accordingly, the decision of the Director of the Bureau of Land Management and the order of the Oil and Gas Supervisor, Geological Survey, are affirmed.

OSCAR L. CHAPMAN,  
*Under Secretary.*

CLAUDE G. BURSON AND ELLSWORTH E. BROWN

A-24409

*Decided April 30, 1947*

**Taylor Grazing Act—Section 15 Grazing Leases—Preference Right.**

Under section 15 of the Taylor Grazing Act, an applicant for a grazing lease is entitled to a preference over other applicants only if he owns land contiguous to the land applied for or controls or occupies contiguous land in a non-public-land status, and if he needs the land applied for in order properly to carry on grazing operations on his base land.

<sup>2</sup> Cf. Solicitor's opinion, April 9, 1947, 59 I. D. 517.

An applicant for a grazing lease under section 15 of the Taylor Grazing Act is not entitled to a preference under that section as a lessee of contiguous public land where such land is held by him under a section 15 grazing lease.

#### APPEAL FROM THE GENERAL LAND OFFICE<sup>1</sup>

Claude G. Burson, of Scottsdale, Arizona, has appealed from a decision of June 17, 1946, by the Acting Assistant Commissioner of the General Land Office. This related to Phoenix 081496, Burson's application of March 26, 1945, for a grazing lease under section 15 of the Taylor Grazing Act of June 28, 1934 (48 Stat. 1269), as amended by the act of June 26, 1936 (49 Stat. 1976; 43 U. S. C. sec. 315m). The decision found that certain of the tracts sought were embraced in private exchange application, Phoenix 081461, by Herman L. Christian, for whom, however, Burson had been substituted, and also in a subsequent State exchange application, Phoenix 081755, made in the interest of Ellsworth E. Brown. Accordingly, pending adjudication of these exchanges, the decision postponed action on the tracts in conflict. As to the remainder of the tracts sought, the decision rejected the Burson application on the ground that said tracts were necessary to the proper use of the base properties of Ellsworth E. Brown, who also had applied for a grazing lease of them, on August 24, 1944, in Phoenix 080126.

Burson bases his appeal on what he regards as his superior equities. He also alleges that Brown, besides owning a 640-acre ranch to the north, has State and Federal leases of about 40,000 acres in nearby townships and that to award this lease to Brown would give him monopolistic control of still another township, to the great disadvantage of small operators who urgently need such grazing as these lands afford.

The lands sought by Burson in his grazing-lease application are in the southeast end of Paradise Valley in Maricopa County. They contain about 6,323.20 acres and are described as follows:

T. 3 N., R. 5 E., G. & S. R. M., Arizona,  
secs. 1, 2, 3, 4, 9, 10, 11, 12, 13, and 14.

With the exception of sec. 4, exactly the same lands were sought by Brown in Phoenix 080126, his grazing-lease application filed August 24, 1944.

Also with the exception of sec. 4, these lands had for almost 16 years been included in Recreational Withdrawal No. 17 made by the Department on November 5, 1928, at the request of the Maricopa

<sup>1</sup> By Reorganization Plan No. 3 of 1946 (11 F. R. 7875, 7876; 7776), the General Land Office and the Grazing Service were abolished and their functions were transferred to the Bureau of Land Management, the change becoming effective on July 16, 1946.

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County Board of Supervisors, which desired to purchase the area for recreational development.<sup>2</sup> The county, however, was unable to finance the project, despite numerous extensions of time, and on October 29, 1943, the General Land Office rejected the county's application, Phoenix 063885, and closed the case. On March 1, 1944, the Secretary ordered revocation of the withdrawal, effective on May 3, 1944.<sup>3</sup>

During the withdrawal the lands as thereby reserved were not open range, and any occupancy or grazing thereof was in trespass. Nor were they subject to entry or grazing lease. Upon May 3, 1944, however, the lands became subject to the Taylor Grazing Act, and applications of various kinds were made for some or all of the released tracts. Among these applications were the four above described, two for exchanges and two for grazing leases, in the interest of Brown and Burson.

As regards the conflicts among these applications, the lands which Burson seeks to lease fall into two classes, as follows:

1. Those which are in conflict with one or both of the exchange applications and on which action has been suspended—

(a) Tracts in both exchanges:

sec. 4, all.

sec. 9, NW $\frac{1}{4}$ ; S $\frac{1}{2}$  (also described as W $\frac{1}{2}$ ; SE $\frac{1}{4}$ ).

sec. 10, S $\frac{1}{2}$ .

sec. 11, SW $\frac{1}{4}$ .

sec. 14, W $\frac{1}{2}$ .

(b) Tracts in the State exchange only:

sec. 13, S $\frac{1}{2}$ .

sec. 14, SE $\frac{1}{4}$ .

2. Those which are in conflict only with Brown's grazing-lease application, and which are the immediate subject of this appeal—

sec. 1, all.

sec. 11, NW $\frac{1}{4}$ ; E $\frac{1}{2}$ .

sec. 2, all.

sec. 12, all.

sec. 3, all.

sec. 13, N $\frac{1}{2}$ .

sec. 9, NE $\frac{1}{4}$ .

sec. 14, NE $\frac{1}{4}$ .

sec. 10, N $\frac{1}{2}$ .

The question for decision here is whether the Land Office was correct in rejecting Burson's application for the lands in class 2 of the table in favor of Brown's supplemental grazing-lease application of August 24, 1944, in Phoenix 080126, and in suspending action on the

<sup>2</sup> For the statutory authority, see the act of June 14, 1926 (44 Stat. 741; 43 U. S. C. sec. 869); 43 CFR 254.

<sup>3</sup> 9 F. R. 3166 (March 23, 1944). For the text of the withdrawal, the county petition and correspondence relating thereto, see Phoenix 063885. This also contains a detailed report on the withdrawn lands by a mining engineer of the General Land Office, with photographs and a map of the withdrawn lands and adjoining areas, showing contours, elevations, and the dominating McDowell Mountains. See, also, the Camel Back Quadrangle, United States Geological Survey.

application for the lands in class 1 pending adjudication of the conflicts thereover.

The law governing the leasing of grazing lands outside of statutory grazing districts is found in section 15 of the Taylor Grazing Act. In effect, this section contains three provisions concerning grazing leases of vacant, unappropriated, and unreserved public lands not included within grazing districts: *First*, it provides that where there is no competition for grazing leases of such lands the Secretary may issue such leases in his discretion and upon such terms and conditions as he may prescribe; *second*, where there is competition for particular tracts of such lands "preference shall be given to owners, homesteaders, lessees, or other lawful occupants of contiguous lands to the extent necessary to permit proper use of such contiguous lands"; *third*, where the isolated or disconnected tract in question contains 760 acres or less, a preference right to lease the whole of such tract upon the Secretary's terms and conditions is given to lawful occupants of either contiguous or cornering lands during a period of 90 days after such tract is offered for lease.

The second provision is the only one here concerned. It means, of course, that the degree of preference to be given to competing lawful occupants of contiguous lands must be commensurate with the degree of need which the contiguous base lands of the respective occupants have for the lease lands if the base lands are to be put to proper use for the grazing of livestock by such occupants. Not only must the base lands be contiguous to the lease lands, but the lease lands must be necessary to the base lands, complementing them and supplying their deficiencies in order to insure their proper use for the occupant's own grazing operations.

This provision means also that, in addition to these conditions of contiguity and necessity, a particular legal status is required of base lands as a third condition essential to the existence of the preference right in question. This is seen in the distinction which the Congress here implicitly draws between the legal status of the contiguous base lands and that of the lands subject to grazing lease. The latter are vacant, unappropriated, and unreserved public lands, subject to disposition or alienation under the Taylor Grazing Act, and such they remain even after inclusion in a grazing lease. The contiguous base lands, on the other hand, are seen upon analysis to be of sharply contrasting status. Either they are patented lands, owned by the grazing-lease applicants or leased by them from municipal or private owners, or, if the legal title to them continue to be in the United States, they are lands which, like those in homestead entries and certain other forms of possession to be described, have been occupied, appropriated or reserved in accordance with law and therefore are nonpublic lands, not subject to disposal under the Taylor Grazing Act. Obviously, the



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Congress intended this difference in status. Not otherwise would it have coordinated in four categories and described as "owners, homesteaders, lessees, or other lawful occupants of contiguous lands" those applicants to whom it intended to give preference rights to grazing leases of vacant, unappropriated, and unreserved public lands.

In this connection it is to be observed that the last category, "*other lawful occupants*," is a general catch-all category designed for the benefit of lawful occupants of contiguous nonpublic lands who do not fall in the particular categories specified. One example of such "other lawful occupants" would be one occupying patented land in pursuance of a contract of purchase. Another would be a holder of a permit for grazing in a national forest.<sup>4</sup> For such lands in national forests as are included in a grazing permit fulfill the legal status requirements above described. Although unpatented, they are nonpublic lands and are not subject to disposition under the Taylor Grazing Act, but are reserved by law for national forests and appropriated to the uses thereof, with authority in the Secretary of Agriculture to regulate their occupancy and use, an authority which has been held to be sufficiently broad to permit such grazing in national forests as is not incompatible with forest purposes.<sup>5</sup> Still further examples of "other lawful occupants" of unpatented but reserved lands come to mind in connection with grazing leases on Indian reservations, in national parks, and on authorized projects in reclamation withdrawals.<sup>6</sup>

<sup>4</sup> John A. Martin and Grover C. Lessard, 59 I. D. 258 (1946); *W. L. Beal v. Deer Lodge Farms Co.*, A. 24203 (Great Falls 085921, 082742), June 18, 1946 (unreported).

<sup>5</sup> For statutory authority for the issuance of forest grazing permits see the act of June 4, 1897 (30 Stat. 35), amended by the act of February 1, 1905 (33 Stat. 628; 16 U. S. C. sec. 551). See, also, Forest Service Manual, vol. 3: National Forest Protection and Management, NF-C1-2, April 1946.

<sup>6</sup> The Department has held that public lands withdrawn, or reserved, for certain purposes not inconsistent with grazing are "unreserved" within the meaning of section 15 of the Taylor Grazing Act and may be leased for grazing, in certain cases, however, only conditionally. Such lands are lands withdrawn for purposes of resurvey, aid of legislation, classification, phosphate, potash, petroleum, oil shale, and for other public purposes generally under the act of June 25, 1910, as amended (43 U. S. C. secs. 141-143); lands withdrawn for proposed power sites but determined by the Federal Power Commission to be subject, conditionally, to consistent uses (Federal Water Power Act of June 10, 1920, sec. 24, 41 Stat. 1075; 16 U. S. C. sec. 818); and lands withdrawn for stock driveways and water holes (43 CFR 295.7 (c), as amended by Circ. 1160a, August 9, 1944). Similarly, grazing lands in reclamation withdrawals on projects under investigation may be leased by the General Land Office in accordance with the principles of section 15 under agreement with the Bureau of Reclamation, as authorized by section 12 of the Taylor Grazing Act.

Solicitor's opinions of January 25, 1934, 54 I. D. 353, 357, and paragraph 4 of syllabus; February 8, 1935, 55 I. D. 205, 209; February 20, 1935, 55 I. D. 211; Instructions of September 14, 1936, 56 I. D. 404; Instructions of October 8, 1937 (Secretary's file 2-147, part 10, Grazing—Administrative); agreement of February 28, 1945, between Bureau of Reclamation and General Land Office, for cooperation for range administration of lands situate outside the exterior boundaries of grazing districts and forest reserves and withdrawn for reclamation purposes (section 12 of Taylor Grazing Act); *Clyde v. Cummings*, 101 Pac. 106, 109 (Utah, 1909); *Boughner v. Magenheimer et al.*, 42 L. D. 595, 599 (1913); general determination by Federal Power Commission on February 16, 1937, *re* grazing on power-site withdrawals, 43 CFR 160.1, fn. 1; also 1674956; opinion *re* Federal Water Power Act, July 13, 1920, 47 L. D. 556; opinion *re* Oil Prospecting Permits in Power-Site Reserves, September 30, 1921, 48 L. D. 459, 465.

In contrast, however, with the nonpublic, reserved lands in the permits and leases just mentioned are the public lands in a section 15 grazing lease. Since these do not meet the statutory requirement that contiguous base be of non-public-land status, the Department consistently holds that contiguous lands in one section 15 grazing lease are not valid contiguous base for a preference right to another such lease.<sup>7</sup>

In summary, therefore, it is apparent that the preference right to a grazing lease accorded by the second provision of section 15 depends upon three essential qualifications pertaining to the base lands, namely, their non-public-land status, their contiguity to the lease lands, and their need for the lease lands. Of these three qualifications no single one is by itself sufficient to create a preference claim. The preference right springs only from the coexistence of all three conditions, and, if one of these be lacking, there is no preference right.

In the instant case, as regards those tracts in Burson's grazing-lease application which are in conflict with Brown's grazing-lease application in Phoenix 080126,<sup>8</sup> the decision of the Acting Assistant Commissioner of the General Land Office rejected Burson's application. The Commissioner proceeded on the assumption that Brown had valid base contiguous to the lands sought and held the latter to be "necessary to permit proper use of the base properties." The Department finds the decision in error as to both the assumption of valid contiguous base and the holding of necessity.

In the first place, as to valid contiguous base, scrutiny of the record shows that Brown has no such base. In order that the acceptability of base offered may be determined in accordance with the rules set forth above, the Department's regulations<sup>9</sup> and its form of application for grazing leases require specific information concerning the lands on which the applicant bases his claim to a preference right. Such information is to include a description of the contiguous tracts by legal subdivisions and an explanation of the nature of the applicant's claims thereto. Regarding base lands held under lease, this requirement entails a showing not only as to the locus of the contiguity but also as to the ownership of the contiguous base. With these requirements Brown complies only in part.

Basing his claim to a preference right on two groups of lands held under lease, Brown makes the following statement as his sole showing:

I have leased from the U. S. and the State of Arizona, with statutory right to renew the same, Secs. 33, 34, 35 and 36, T. 4 N., R. 5 E., which adjoin the area applied for on the north; and I have leased from the United States, under

<sup>7</sup> J. S. and Clara Parsons, Herman Werner, and Cecil Pintarelli, A. 22370 (Cheyenne 064045, 058527, and 060620), January 8, 1940 (unreported).

<sup>8</sup> See heading 2 of the table, *supra*, p. 541.

<sup>9</sup> 43 CFR 160.7 (e).

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Serial 080126, Lots 1, 2, 3, 4,  $S\frac{1}{2}N\frac{1}{2}$ ,  $SE\frac{1}{4}$ ,  $NE\frac{1}{4}SW\frac{1}{4}$  Sec. 5; Lots 3, 4,  $SE\frac{1}{4}NW\frac{1}{4}$ ,  $NE\frac{1}{4}SW\frac{1}{4}$  Sec. 6;  $SW\frac{1}{4}NE\frac{1}{4}$ ,  $W\frac{1}{2}SE\frac{1}{4}$ ,  $SE\frac{1}{4}SE\frac{1}{4}$ , Lot 2, Sec. 7;  $NE\frac{1}{4}NE\frac{1}{4}$  Sec. 15;  $N\frac{1}{2}SE\frac{1}{4}$  Sec. 18;  $S\frac{1}{2}S\frac{1}{2}$  Sec. 23;  $NW\frac{1}{4}$ ,  $W\frac{1}{2}NE\frac{1}{4}$ ,  $SE\frac{1}{4}SE\frac{1}{4}$  Sec. 25;  $N\frac{1}{2}$  Sec. 26; and  $W\frac{1}{2}SW\frac{1}{4}$  Sec. 27, T. 3 N., R. 5 E.

As to the first group of lands here described, Brown specifies the locus of contiguity as secs. 33, 34, 35, and 36, but does not specify the ownership of the respective sections. This general statement that he has leased them "from the U. S. and the State of Arizona" leaves in doubt whether these contiguous tracts are patented lands in a State lease and therefore valid base, or are public lands in a Federal section 15 lease and therefore invalid base.

As to the second group of base lands, he specifies the ownership of the numerous tracts described but not the locus of their contiguity. It is apparent that not one of the tracts so described is contiguous to any portion of the lands sought. Further, they are all controlled by Brown solely by virtue of the section 15 grazing lease issued on July 14, 1944, and mentioned as Phoenix 080126. The lands in the second group are therefore doubly ineligible as base. Similarly, although there are contiguous lands in the first group, they also are all ineligible as base, being included in a section 15 lease. At the time of Brown's application on August 24, 1944, they were included in Phoenix 077742, issued on February 21, 1939. At present, by decision of June 17, 1946, they are included in a consolidated grazing lease under Phoenix 080126-A.

An additional point to be noted regarding the first group of lands offered as base is the statement that secs. 33, 34, 35, and 36 adjoin the area applied for, on the north. Of these lands, secs. 36, 35, and 34 in T. 4 N., R. 5 E., do actually border on secs. 1, 2, and 3, respectively, of the lands sought in T. 3 N., R. 5 E., and are the sections included in the section 15 grazing leases just now described. But sec. 33 does not adjoin any of the lands which Brown seeks to lease. Instead, it is contiguous only to sec. 4, which is not included in Brown's application. Sec. 33 is, therefore, not contiguous land.

Lastly to be noted is Arizona's ownership of sec. 33. Information available to the Department indicates that sec. 33, along with secs. 32 and 31 not here mentioned by Brown, was at one time leased to Brown by the State. During the life of such lease, sec. 33 would therefore have been valid base had it been contiguous to desired and necessary lease lands. Whether that State lease to Brown is still in force does not appear. But even if its present validity were to be assumed, Brown's control of sec. 33 thereunder would be of no avail to him in this case, the section having no contiguity to the lands sought.

To be sure, this sec. 33 *corners* on land which Brown seeks, namely, that in sec. 3. But in the circumstances here present, even this accident of cornering does not avail Brown under section 15 of the Taylor Act. For sec. 3, although containing only about 640 acres, is not a *disconnected* tract of 760 acres or less, as required by the statute, but is a closely related part of a compact body of land comprising almost 4,000 acres, an acreage far beyond that allowed in the case of cornering base.

The facts reviewed show that the base lands offered are not valid contiguous base. Most of the tracts do not adjoin any portions of the lands sought, and the few that are contiguous do not meet the legal status requirement. It results that Brown has no preference right, for, as was observed above, failure of the base lands to meet any one of the three basic conditions precludes a preference right. It is, therefore, not essential to inquire whether the lease lands are necessary to the proper use of Brown's base, but, in view of the Land Office decision's holding that they are, the point will be considered.

It appears that in addition to the scattered tracts which Brown leases from the United States in the western and southern portion of T. 3 N., R. 5 E., he controls a great deal of range elsewhere, including some to the west and northwest in Tps. 3 and 4 N., R. 4 E. But the particular range to which he wishes to add the lease lands here sought lies in Tps. 4 and 5 N., R. 5 E., the two townships directly to the north. There Brown has some leases from the United States and 32 from the State. He also owns a headquarters and ranch home in T. 5 N., R. 5 E., sec. 16, NE $\frac{1}{4}$ , and has a patented stock-raising homestead in T. 4 N., R. 5 E., sec. 19, S $\frac{1}{2}$ ; sec. 20, S $\frac{1}{2}$ . Altogether, therefore, he there controls from 30,000 to 40,000 acres of grazing land to which the lease sought would add about 4,000 acres.

All these lands are of similar topography, dominated by the rugged and irregular McDowell Mountains, which almost entirely cover the township in 4 and 5 N. and which wholly occupy the NE $\frac{1}{4}$  of 3 N. and over two other sections. Departmental maps<sup>10</sup> and reports show that in sec. 26 and the northern part of sec. 35, T. 4 N.,<sup>11</sup> McDowell Peak rises to a height of 4,022 feet. In the southern part of the same sec. 35 and on the line of the lease lands in secs. 2 and 1 of 3 N. is Thompson Peak, 3,980 feet high. These dominant peaks are buttressed by sharp, uneven, branching spurs, from which rise rough pinnacles of schist or rounded masses of granite. Between the spurs are literally hundreds of narrow, steep ravines, draws, and gulches. The spurs of Thompson Peak thrust southerly and southeasterly into

<sup>10</sup> See footnote 3, *supra*.

<sup>11</sup> In Brown's consolidated lease, Phoenix 080126-A.

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the lease lands, causing all these, with the exception of sec. 9 and portions of secs. 3 and 10, to be extremely rough and mountainous. Only along the southern borders of secs. 13 and 14 does the elevation fall below 2,000 feet.

Despite the uneven character of its terrain, this whole mountainous area, base and lease lands alike, affords some grazing on the less steep slopes and in basins at their foot. The vegetation consists of ironwood, palo verde, mesquite, cacti, and some of the higher elevation grasses, such as grama, 6 weeks' grasses, Indian wheat, and some alfilaria in season. Although sparse, this cover is useful in the second half of the year when early range has given out in lower lands to the west in Paradise Valley. But its carrying capacity is limited to 8 or 10 cattle yearlong per section, a total for the nine sections in the lease lands of from 72 to 90 animals only.

The great drawback on all these lands is the scarcity of water. In an affidavit of June 5, 1945, in Phoenix 080126, Brown comments on this and other features of the area. In speaking of the development of his own range in the north by himself and his deceased father, he says, in part:

The terrain covered by this range is largely rough, rocky and mountainous; the balance of it being semi-arid or desert, typical of most of central Arizona; and it does not have a high carrying capacity \* \* \*. Because of these factors and conditions, it is highly desirable that cattle be not required to walk long distances to and from water, and it has been our constant effort, in the development and use of this range, to provide watering facilities so that stock will not have to walk excessive distances to and from water. Indeed, it is impracticable and unprofitable to require cattle to walk long distances to and from water on this range.

Brown tells of the water supplies which he and his father made a point of providing for this range, and among these supplies he specifies acquisition and development of a living spring known as Mountain or Frazier Spring in the SW $\frac{1}{4}$  sec. 23, T. 4 N., R. 5 E., on the northern descent of McDowell Peak in secs. 35 and 26. This spring's yield is 6 gallons per minute. In consequence of the efforts described, Brown says that the cattle on this range are now well serviced with water.

Brown speaks also of the lands which he wishes to lease. He points out that they are really a part of the same area as his range in T. 4 N.; that they have the same rough, rocky, and mountainous character; and that they too are deficient in stock water. In telling of this, Brown intimates that for cattle on a portion of the area he can supply water from certain wells which he says that he owns.<sup>12</sup> Of these wells,

<sup>12</sup> Some of these seem to be leased rather than owned by Brown, and it is not clear that they are controlled by Brown at the present time.

two are in the township to the west. The several mentioned are—

1. Barnum well and tank in T. 3 N., R. 4 E., sec. 1, NW $\frac{1}{4}$ .
2. Stevenson well in T. 3 N., R. 4 E., sec. 24, NE $\frac{1}{4}$ .
3. Titel well in T. 3 N., R. 5 E., sec. 28, SE $\frac{1}{4}$ .

A glance at the map shows that none of these wells is on land adjoining the lease lands and that all are some distance away in the midst of patented lands. How Brown could use their water to service any of the lease lands without trespassing on the many patented lands intervening, Brown does not state. However, Brown may not be counting on these wells, for he points to other water as the only practicable source, his affidavit further stating:

\* \* \* However, it is much to be desired that cattle grazing that area have access to closer water. For some time I have been in consultation with Mr. \* \* \* of the Range Improvement Service, with this purpose in view. *It is impracticable to drill wells within the area referred to because of the excessive depth to water, and the uncertainty of securing any water, or adequate water. In fact, the only practicable source from which water for adequately servicing this area is by piping, by gravity, water from the said Mountain or Frazier Spring.* In several consultations with Mr. \* \* \* he has approved the feasibility of so bringing water from the said spring to the area; and I have secured priority thru the Office of Price Administration to purchase the necessary pipe and have arranged for acquiring it; and am ready, willing and able to proceed with the development, provided this area shall be leased to me. [Italics supplied.]

As regards this proposed use of Mountain or Frazier Spring, the facts mentioned show that both McDowell and Thompson Peaks lie between this spring and the lease lands, presenting a rugged mountain barrier to the economic servicing of the lease lands by any direct line of piping thereto. Indeed, it appears that to carry this water onto the lease lands and properly service them, it would be necessary to lay the pipe around the mountains, west, south, southeast, and east, for a distance estimated at from 15 to 18 miles all told. Whether the spring's reported flow of 6 gallons per minute is large enough to be carried so far has been questioned in the field, particularly in view of Brown's reported intention to use part of the piped flow on his lands in both Rs. 3 and 4 E. of T. 4 N., whether he obtains a lease of the lands here sought or not. Another point to be noted insofar as the lease lands alone are concerned is the probable cost of this enterprise. At an estimated expense of \$500 per mile, an investment of \$7,500 or more would be required and would seem scarcely justified in view of the very limited number of stock that would be benefited, under 100 head yearlong and probably no more than 150 for a 6 months' period.

The facts presented show that the lease of these lands to Brown would add to his large range on the north about 4,000 acres of grazing

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land similar in topography, vegetation, forage, and carrying capacity, but so deficient in stock water that for adequate supplies it would have to draw upon the not too abundant or accessible waters of Frazier Spring in the base lands. Thereby, of course, the lease lands would reduce considerably the quantity of water available for base-land needs and correspondingly increase the water deficiencies of the base range which Brown and his father have been at such pains to overcome. In effect, therefore, on the one hand, the base by supplying the water deficiencies of the lease land would further the proper grazing use of the lease and, on the other hand, the lease land by increasing base-land deficiencies, not supplying them, would tend to impair proper use of the base, not promote it. In such circumstances, it is obvious that, whether or not the lease needs the base, the base does not need the lease.<sup>13</sup> In the absence of such necessity, there can be no preference right in Brown. The Land Office conclusion is, therefore, seen to have been erroneous.

In these premises, it remains to consider the claims of Burson, the appellant herein. It appears that Burson was reared on a cattle ranch; that at various times he has owned and operated small ranches, and for a number of years has bought and sold cattle. In March 1945, with a view to livestock operations in Paradise Valley, he bought Herman Christian's ranch of 170.96 acres in T. 4 N., R. 4 E., sec. 35, SE $\frac{1}{4}$ , and immediately to the south in T. 3 N., R. 4 E. acquired State leases of 480 acres in sec. 2, N $\frac{1}{2}$ , SW $\frac{1}{4}$ , thus controlling in R. 4 E. a compact body of 650.96 acres. In addition, he reports a State lease of about 160 acres a mile or so to the east in T. 3 N., R. 5 E., sec. 6, and private leases of 440 acres to the southeast in T. 3 N., R. 5 E., sec. 23, NE $\frac{1}{4}$ , NE $\frac{1}{4}$ NW $\frac{1}{4}$ , SE $\frac{1}{4}$ NW $\frac{1}{4}$ ; sec. 24, NW $\frac{1}{4}$ . He thus has all told a range of 1,250 acres, and this he expects to increase through additional leases for which he says he is negotiating.

His property purchased from Christian is well improved. It has a good ranch home, corrals, a mill, and a large well with a good pump and jack. There are also two water storage tanks holding 30,000 and 2,000 gallons, respectively, and troughs holding about 3,000 gallons. Here Burson can water 1,000 head of cattle the year round, and here the cattle of other stockmen, including Brown, frequently

<sup>13</sup> Nor does Brown anywhere say that his base has a need for these lands. Moreover, it would seem from Brown's application of August 24, 1944, that in the years prior thereto his base had no need of these lands, for Brown says that such of his stock as had grazed thereon were there only "casually," having "drifted onto this area as part of the open range" in company with other cattle, and he could not tell to what extent or in what numbers his cattle had grazed there. In this connection, it is to be observed that during the years mentioned these lands were not open range but were in Recreational Withdrawal No. 17, and that the owners of any cattle drifting thither were, therefore, in trespass. *Supra*, pp. 540 and 541.

water when other sources in the area give out. Burson has also a dirt tank 300 feet long by 25 feet wide, in which in normal times he keeps enough water for 100 head of stock. Additional water controlled by Burson is the well on his private lease in sec. 23, which he expects to develop for stock service and which he has the financial means to equip. Further, he says he has arranged to lease other waters in the immediate vicinity, and if he obtains this lease will build surface tanks up in the hills.

When filing this application, Burson said that because of the prevailing drought there was no feed in the area for any great number of livestock, and that he then owned only about 20 cattle and 8 horses but that he expected to build up a herd of 175 if he obtained the lease here sought. In contrast, Brown then applying owned only 100 cattle and 18 horses, despite his large range, and he gave no figure for the number of cattle he would graze on the lease lands, saying only that his use of them jointly with his range to the north would depend on the seasons and the precipitation.

Most of these Burson holdings are in the so-called "flat" lands of Paradise Valley, where grazing is excellent and carrying capacity high from January 1 until late May or early June. For years these "flat" lands, chiefly unfenced and unoccupied patented lands entirely surrounding the few disconnected tracts of public land that remain in the lower part of the valley, have been grazed by hundreds of outside cattle, whose owners have either leased the forage on the private lands or have been willing that their cattle should trespass on it, drifting thither from the strategic disconnected public tracts now controlled by Brown. In the late spring when the dry season begins, most of these outside cattle are usually shipped out to market for feeders or as utility stock. But for those cattle which are kept, it is necessary for local owners like Burson to have supplementary range in the hills and mountains, where such later-starting forage as they provide is then ready for grazing during the rest of the year.

Such supplementary late range is found to the north on Brown's hilly lands, and it is Brown's practice to drive thither from the flats such of his cattle as he has not shipped away. The cattle of others he has been at some pains to keep out. Early in 1941 or thereabouts, Brown built a wire fence on the south of his range to exclude such cattle. This fence runs along the north and east sides of sec. 35, T. 4 N., R. 4 E., thence east on the township line along the south side of secs. 36, 31, 32, and 33, ending at the foot of the steep hills of Thompson Peak in sec. 34. Thus, with the help of the high mountain, it effectually separates Brown's northern range not only from the flat lands but also from all the rest of the township here concerned.



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Supplementary late forage is found also to the east, on the unfenced mountainous public lands so long included in Recreational Withdrawal No. 17, and for years this has been grazed in trespass by cattle drifting with the change of seasons from the unfenced valley range, patented and disconnected public lands alike. As was noted above, Brown was among the owners of such cattle, despite his supplementary forage to the north. So, too, was Burson's predecessor Christian, who unlike Brown had no other place to graze his cattle during the dry season, and who said that if he could not run them there he would have to retire from the livestock business in this area.

As Christian's successor, Burson is in no different case. He too needs supplementary forage to insure proper use of the patented lands which he leases and owns in the flats. He has, therefore, applied for this grazing lease of the lands in the former recreational withdrawal to supply the deficiencies of his base in the manner above set forth. The lands on which he bases his claim to the lease are those above described. Of these, the lands in secs. 23 and 24 are patented lands held under private lease, they adjoin secs. 14 and 13, respectively, of the lease lands sought, and they have an urgent need for the supplementary forage of the lease lands. Thus satisfying the three basic conditions of nonpublic legal status, contiguity and necessity, they constitute valid contiguous base, and under section 15 entitle Burson to a preference right to the lease requested. Moreover, since Burson's competitor, Brown, has no preference right to any of these lands, there is no reason for any division of the lands sought. Legally, all may be leased to Burson.

As has been noted, some of these lands are in conflict with two exchange applications, themselves in conflict, and eventually may be so adversely affected by the final decision on the exchanges as to preclude any lease. In view of this uncertainty as to ultimate rights, a long lease of the lands sought would be of no advantage to the lessee, but a temporary short-term lease might be very helpful to him and would prejudice nobody's rights. The Department therefore sees no reason for suspending action on the application for the lands in conflict until final adjudication of the exchanges.

The Commissioner's decision is reversed and the case remanded for issuance to appellant Burson of a temporary 2-year grazing lease of all the lands sought at the recommended rental of 1 cent per acre.

C. GIRARD DAVIDSON,  
*Assistant Secretary.*

## FUNCTIONS OF OIL AND GAS DIVISION

## Delegation of Authority—The President—Secretary of the Interior—Oil and Gas Division.

Although the President, by virtue of his office and constitutional powers, exercises general supervision over the departments and independent establishments which comprise the executive branch of the Government, he is not required to exercise his supervisory and coordinating responsibilities personally, but may delegate functions to the heads of the various departments or to other officials in the executive branch of the Government.

The President properly delegated to the Secretary of the Interior the President's functions with respect to coordinating the activities of the several departments and other agencies of the Government as they relate to oil and gas matters, and the President's powers and functions in connection with the administration of the Connally "Hot Oil" Act.

The Secretary properly delegated to the Oil and Gas Division the task of assisting him in the discharge of the responsibilities vested in him by the President and by the Congress in the statute charging the Secretary with the duty of supervising the public business relating to petroleum conservation.

An organizational status created by statute is not essential to the valid existence of a division, bureau, or other agency, as such agencies may be created by the head of a department to perform, under his supervision, functions vested in him by law.

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## TO THE SECRETARY.

This responds to an oral request for advice as to whether the functions of the Oil and Gas Division of this Department discussed by the Committee on Appropriations of the House of Representatives in the last paragraph on page 9 and the first paragraph on page 10 of the report (H. Rept. No. 279, 80th Cong.) on the pending Interior Department Appropriation Bill\* are authorized by law. These functions pertain to the coordination and unification of the policies of the Federal Government concerning petroleum, and to the collection and analysis of statistics relative to petroleum and its products.

1. In a communication dated May 3, 1946, the President issued the following directive to the Secretary of the Interior:

To the extent possible, one agency must bear the primary responsibility for providing a focal point for leadership and information for the numerous agencies of the Federal Government dealing with petroleum. I, therefore, request that you undertake the initiative in obtaining coordination and unification of Federal policy and administration with respect to the functions and activities relating to petroleum carried on by the various departments and agencies. Where practicable and appropriate governmental activities relating to petroleum should be centralized and I ask that from time to time you submit to me for consideration proposals looking to the accomplishment of this objective.

You should, through such office as you designate, serve as the channel of communication between the Federal Government and the petroleum industry,

\*For the fiscal year ending June 30, 1948 (act of July 25, 1947, 61 Stat. 460). [Editor.]

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and as the liaison agency of the Federal Government in its relations with appropriate State bodies concerned with oil and gas. \* \* \*

It is clear that the several functions mentioned by the President in his communication were and are lawfully vested in the President. Several Government departments are vitally concerned with problems relating to petroleum and petroleum products. For example, the Navy Department, the War Department, and the Treasury Department are interested in the procurement of petroleum and petroleum products for governmental activities; the Department of the Interior, the War Department, and the Navy Department perform important research functions in this field; and the Department of the Interior, the Department of Agriculture, the War Department, and the Navy Department are required to deal with problems which pertain to the discovery and development of oil and gas deposits in public lands administered by the several agencies. Under the Constitution, the executive power of the Government is vested in the President (Art. II, Sec. 1, Cl. 1), and he is charged with the responsibility of seeing to it that the laws of the United States are faithfully executed (Art. II, Sec. 3). By virtue of his office, the President exercises general supervision over the departments and independent establishments which comprise the executive branch of the Government.

However, these supervisory and coordinating responsibilities are so great that the President is not required to exercise them personally. Instead, the President may delegate functions to the heads of the various departments or to other officials in the executive branch of the Government. *Wilcox v. Jackson*, 13 Pet. (38 U. S.) 498, 513 (1839); *Williams v. United States*, 1 How. (42 U. S.) 290, 297 (1843); *The Confiscation Cases*, 20 Wall. (87 U. S.) 92, 109 (1873); *Wolsey v. Chapman*, 101 U. S. 755, 770 (1879); *Chicago, Milwaukee & St. Paul Railway Co. of Idaho v. United States*, 244 U. S. 351, 357 (1917). Consequently, there was no legal impediment to prevent the President from vesting in the Secretary of the Interior the President's functions with respect to coordinating the activities of the several departments and other agencies of the Government as they relate to oil and gas matters.

2. The so-called Connally "Hot Oil" Act (49 Stat. 30; 15 U. S. C. sec. 715 *et seq.*) authorizes the President, among other things, to require the submission of data "relating to the production, storage, refining, processing, transporting, or handling of petroleum and petroleum products \* \* \*" (15 U. S. C. sec. 715d); and makes it necessary that continuing studies be made with respect to the supply and demand situation concerning petroleum and petroleum products. (See 15 U. S. C. sec. 715c.)

This statute expressly provides that the President may delegate to "any agency, officer, or employee" the execution of any of the powers and functions vested in the President by the act (15 U. S. C. sec. 715j). Pursuant to this authorization, the President by Executive Order No. 7756 (December 1, 1937), as amended by Executive Order No. 9732 (June 3, 1946), delegated to the Secretary of the Interior all the powers and functions vested in the President by the statute, except the authority to suspend the section (15 U. S. C. sec. 715b), which prohibits the shipment or transportation in commerce of contraband oil.

3. The Secretary of the Interior is charged by statute with the duty of supervising the "public business relating to \* \* \* Petroleum conservation" (5 U. S. C. sec. 485).

4. Neither the President nor the Congress intended that the Secretary of the Interior should personally perform the various functions mentioned in parts 1, 2, and 3, above as being vested in the Secretary. In delegating the coordinating function to the Secretary, the President mentioned the establishment of an "office" by the Secretary; and in delegating the responsibility for the administration of the Connally Act, the President expressly authorized the Secretary to establish an Oil and Gas Division to assist in administering the act, to cooperate with the States which produce oil and gas, and to conduct the continuing studies contemplated by the statute with regard to the supply of and the demand for petroleum and petroleum products.

Although Congress made no specific mention of the utilization by the Secretary of the assistance of subordinates in carrying out his statutory duties relating to petroleum conservation, such an authorization is clearly to be implied. As the Attorney General stated in 39 Op. Atty. Gen. 541, 546—

The theory underlying the vesting in an executive officer of numerous duties, varying in importance, is not that he will personally perform all of them, but rather that he will see to it that they are performed, the responsibility being his and he being chargeable with the result. \* \* \*

In recognition of this principle, Congress, in section 161 of the Revised Statutes (5 U. S. C. sec. 22), has in general terms authorized the head of each Department to determine the manner in which the business of the Department shall be distributed among and performed by the personnel of the Department. To the extent that appropriated funds are available for the employment of personnel, the head of a Department can establish such positions and appoint such employees as may be necessary to perform, under this supervision, the functions that are vested in him or in the Department by law (Rev. Stat. sec. 169; 5 U. S. C. sec. 43; 37 Op. Atty. Gen. 364).

Under the legal authorities discussed above, the Secretary of the Interior, in Order No. 2193 (May 6, 1946), established the Oil and Gas Division and assigned to it the task of assisting him in the dis-

*May 16, 1947*

charge of his responsibilities in connection with the Connally Act, the general subject of petroleum conservation, and the coordination of Federal policies and actions under the President's letter of May 3, 1946.

The fact that the Oil and Gas Division was established by administrative action, and not by statute, has no significance. It is not necessary that a group of employees to whom the head of a department has delegated the task of performing, under his supervision, functions vested in him shall have an organizational status created by statute. There are numerous examples throughout the Government of organizations which were not established by Congress, but instead were created by administrative action to perform functions vested in officials of the executive branch of the Government. An outstanding example of such an organization is the Bureau of Reclamation of this Department. This important Bureau was not created by Congress, but by the Secretary of the Interior to assist him in the administration of the reclamation laws. Other examples of important governmental organizations created by administrative, rather than congressional, action are the Forest Service and the Extension Service of the Department of Agriculture, and the Secret Service of the Treasury Department. (See 1 Comp. Dec. 1, 8.) Despite the fact that these organizations came into existence through administrative action and without charters from Congress, appropriations for their activities have been made from year to year over long periods of time by the Congress.

Therefore, the fact that there is no statute specifically establishing the Oil and Gas Division and empowering it to perform specified functions does not prevent the Congress from making appropriations to finance the activities of that division. The Oil and Gas Division is performing functions which are vested by the Constitution or by statute in the President or in the Secretary of the Interior, and which have been properly delegated to the Oil and Gas Division. Hence, appropriations to finance those functions within the Oil and Gas Division are properly to be regarded as appropriations for purposes authorized by law.

MASTIN G. WHITE,  
*Solicitor.*

## DELEGATION OF VETO POWER OVER TRIBAL LEGISLATION

### Delegation of Authority—Secretary of the Interior—Commissioner of Indian Affairs—Tribal Legislation.

When a tribal constitution or charter provides that certain types of ordinances or resolutions shall be subject to review or approval by the Secretary of the Interior, the Secretary's function is delegable, and personal consideration and action by the Secretary is not required.

Under general principles governing the delegability of Secretarial powers, the function of reviewing or approving tribal legislation can be delegated to the Commissioner of Indian Affairs as well as to the Under Secretary and the Assistant Secretaries of the Interior.

The Indian Delegation Act authorizes the Secretary to delegate to the Commissioner of Indian Affairs the power to review or approve tribal legislation. If the Secretary issues general regulations to guide the Commissioner of Indian Affairs in the exercise of the delegated authority, the Secretary has unfettered discretion in the matter of delegating to the Commissioner authority to act under the regulations in particular instances or situations which come within the scope of the regulations.

M-34631

MAY 16, 1947.

TO THE SECRETARY.

This is in response to Assistant Secretary Davidson's informal request that I consider the question whether it is legally permissible for the Secretary to delegate to the Commissioner of Indian Affairs the power to approve or veto legislation enacted by Indian tribes which are organized under the Indian Reorganization Act of June 18, 1934 (48 Stat. 984; 25 U. S. C. sec. 461 *et seq.*).

Authority for the enactment of tribal legislation, which is in the form of ordinances or resolutions passed by the tribes or their governing bodies, is to be found in constitutions adopted by the tribes pursuant to section 16 of the Indian Reorganization Act (25 U. S. C. sec. 476), or in charters issued to the tribes by the Secretary of the Interior pursuant to section 17 of that statute (25 U. S. C. sec. 477).

When a tribal constitution or charter provides for Secretarial participation in the enactment of tribal legislation, it declares that tribal actions dealing with certain specified matters shall be subject either to "review" or "approval" by the Secretary of the Interior. While the exercise of either type of Secretarial power may result in the veto of tribal legislation, there is an important difference between the two processes. An ordinance or resolution which is subject to "review" must first be submitted to the superintendent of the particular Indian agency, and the superintendent must either approve or disapprove it within 10 days. If he gives his approval, the ordinance or resolution becomes effective as of the date of such approval. The ordinance or resolution must, nevertheless, be transmitted to the Secretary, who, within 90 days of its enactment, may rescind it. Failure upon the part of the Secretary to act within the 90-day period with reference to tribal legislation which has been approved by the superintendent leaves the ordinance or resolution in full force and effect. If the superintendent disapproves an ordinance or resolution, the tribal governing body may by a majority vote refer the legislation to the Secretary; and if the Secretary approves the ordinance or resolution within 90 days of its enactment, it thereupon becomes ef-

May 16, 1947

fective. Provisions for the "review" of tribal legislation are found only in tribal constitutions. Indian charters do not provide for this type of procedure.

When tribal legislation is subject to "approval" by the Secretary rather than to "review," there is no time limit within which such approval must be given; and until the Secretary has actually approved a particular ordinance or resolution, the legislation does not become effective. The superintendent is not involved in the process, except by way of making a recommendation to the Secretary.

Ordinarily, the parts of constitutions or charters which provide for Secretarial review or approval of tribal actions refer only to "the Secretary of the Interior." However, it is expressly provided in some instances that particular forms of tribal action shall be subject to review or approval by "the Secretary of the Interior or his designated representative."<sup>1</sup> It might be argued that this difference, particularly where the two variations are found in the same constitution or charter, indicates that those concerned with the drafting and approval of tribal constitutions, or with the drafting and issuance of tribal charters, intended that the Secretary should personally exercise the "review" and "approval" functions when only he is mentioned; and that such functions should be regarded as delegable only in those instances where delegation is expressly provided for in the language of the constitutions and charters. However, I am informed that, over a period of approximately 10 years, it has been the customary practice in the Office of the Secretary, when tribal ordinances and resolutions have been received for "review" or "approval," to distribute them among the Under Secretary and the Assistant Secretaries for handling under general delegations of authority made to these officials by the Secretary (e. g., 43 CFR 4.0; 11 F. R. 8164; Secretary's Order No. 2233, July 26, 1946); and that personal consideration by the Secretary of these tribal ordinances and resolutions has not been regarded as essential to the validity of the departmental action upon them. Notwithstanding the fact that the Under Secretary and the Assistant Secretaries have exercised the "review" and "approval" functions under tribal constitutions and charters on many occasions over a long period of time, it is understood that the propriety of their actions in this respect has never been questioned. Consequently, it appears that, as a practical matter, the Department

<sup>1</sup> For example, see Article III and Article V, section V, of the constitution of the San Carlos Apache Tribe of Arizona, and Article IV, section 1, subdivision 5, of the constitution of the Santa Clara Pueblo, New Mexico. Also see the provisions of the following constitutions relating to the determination of economic units in land assignments: Omaha Tribe of Nebraska; Ponca Tribe of Native Americans of Nebraska; Santee Sioux Tribe of the Sioux Nation of Nebraska; Winnebago Tribe of Nebraska; Walker River Paiute Tribe of Nevada; Alabama and Coushatta Tribes of Texas.

can continue to regard these functions of the Secretary under tribal constitutions and charters as being delegable in nature, rather than as requiring personal consideration and action by the head of the Department; and that there is no reason at this late date to become concerned over technical objections which might be made with respect to the delegability of such functions.

If the "review" and "approval" functions of the Secretary under tribal constitutions and charters are delegable and can be exercised by the Under Secretary and the Assistant Secretaries under general delegations of authority from the Secretary, it is my view that such functions can also be delegated to the Commissioner of Indian Affairs. The Commissioner, like the Under Secretary and the Assistant Secretaries, is an officer appointed by the President and confirmed by the Senate (25 U. S. C. sec. 1). Hence, if a distinction within the Department concerning the respective qualifications of "Officers of the United States" and of "Inferior Officers" (Constitution, Art. II, Sec. 2, Cl. 2) to receive delegations of Secretarial powers is justified (*cf.* 35 Op. Atty. Gen. 15, 20), that distinction is not pertinent here. Moreover, the general authority of the Secretary of the Interior under section 161 of the Revised Statutes (5 U. S. C. sec. 22) to delegate his powers extends to the Commissioner of Indian Affairs (insofar as functions in the field of Indian affairs are concerned) as well as to the Under Secretary and the Assistant Secretaries. Although the specific statutory authority of the Secretary to delegate powers to the Assistant Secretary whose position was created by section 6 of the act of March 14, 1862 (12 Stat. 355, 369; Rev. Stat. secs. 438, 439; 5 U. S. C. secs. 482, 483), arising from the express authorization for the Secretary to prescribe the duties of this officer, has no exact counterpart in the statutes relating to the Commissioner of Indian Affairs, Congress itself has defined the duties of the Commissioner as covering "the management of all Indian affairs and of all matters arising out of Indian relations." (Rev. Stat. sec. 463; 25 U. S. C. sec. 2.) It seems clear that the function of passing upon tribal legislation, under general instructions issued by the Secretary, would properly come within the management job which Congress has prescribed for the Commissioner. Therefore, I believe that, under general principles governing the delegation of Secretarial powers, the Secretary's functions in connection with the "review" and "approval" of tribal ordinances and resolutions may be delegated to the Commissioner of Indian Affairs.

Additional—and, in my judgment, conclusive—support for the view that the Secretary's "review" and "approval" functions under tribal constitutions and charters may be delegated to the Commissioner of Indian Affairs is furnished by the act of August 8, 1946 (25 U. S. C. A., Supp., sec. 1a). That statute specifically authorizes the Secretary of



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the Interior to delegate to the Commissioner of Indian Affairs his powers and duties under the laws governing Indian affairs "insofar as such powers and duties relate to action in individual cases arising under general regulations promulgated by the Secretary of the Interior pursuant to law"; and provides for the subdelegation of such powers and duties by the Commissioner to subordinate officials of the Bureau of Indian Affairs. Although it can be argued that tribal ordinances and resolutions submitted for review or approval are not "individual cases," within the technical meaning of that term as used in connection with legal proceedings, the legislative history of the portion of the statute quoted in the preceding sentence indicates that the term "individual cases" was not used by Congress in a narrow or technical sense. It appears that this language was inserted in the bill (H. R. 4386, 79th Cong.) which later became the act of August 8, 1946, as the result of an amendment proposed by the Senate Committee on Indian Affairs (see S. Rept. No. 1318, 79th Cong., 2d sess. (1946)). Senator O'Mahoney, Chairman of the Indian Affairs Committee and the manager of the bill on the floor of the Senate, explained that the amendment was—

\* \* \* adopted by the Committee on Indian Affairs to meet the objections which I, as chairman of the committee, raised, and to adjust the bill to the understanding of the committee.

The fear which I expressed at the time the bill was under consideration by the committee was that it would result in the delegation to subordinate officials of the power to write regulations, and I expressed clearly my conviction—and in this opinion the committee agreed with me—that Congress should not adopt any law which by any manner of interpretation could lead to such a conclusion. [92 Cong. Rec. 6996.]

Thus, the congressional purpose in inserting the phrase, "insofar as such powers and duties relate to action in individual cases arising under general regulations promulgated by the Secretary of the Interior pursuant to law," in the legislation was merely to insure that the Secretary of the Interior would not delegate his power to promulgate general regulations governing the administration of Indian affairs. This leads me to conclude that if the Secretary issues under the Indian laws general regulations to guide the Commissioner of Indian Affairs in the exercise of the delegated authority, the Secretary has unfettered discretion in the matter of delegating to the Commissioner authority to act under the regulations in particular instances or situations which come within the scope of the regulations. Therefore, I believe that an order of the Secretary delegating his "review" and "approval" functions under tribal constitutions and charters to the Commissioner of Indian Affairs, and furnishing general instructions for the guidance of the Commissioner in passing upon particular ordinances and resolu-

tions, would fall within the specific authorization of the act of August 8, 1946.

In view of the fact that the process of "reviewing" a tribal ordinance or resolution must be completed within 90 days from the date of its enactment, it probably would not be feasible to authorize the Commissioner of Indian Affairs to take unfavorable action with respect to such ordinances and resolutions and then provide for a process of appeal to the Secretary by the tribes, as contemplated by the act of August 8, 1946. Because of the time element, and by way of obviating the necessity for an appeal procedure, the Commissioner could be instructed to transmit to the Secretary for action any ordinance or resolution submitted for "review" if the Commissioner believes that it should be rescinded or that a disapproval previously given by the superintendent should be confirmed. Although the time factor is not so important with respect to tribal legislation submitted for "approval," I believe that, in order to avoid confusion, all ordinances and resolutions should be handled in the same manner, insofar as the power of the Commissioner to take unfavorable action of an authoritative nature is concerned. Thus, I suggest that the Commissioner not be empowered to disapprove or rescind tribal legislation; but, rather, that he be instructed to forward to the Secretary for action any ordinance or resolution which, in the opinion of the Commissioner, should be disapproved or rescinded.

A draft of a proposed order of delegation <sup>2</sup> along the lines indicated above is attached for your consideration.

MASTIN G. WHITE,  
*Solicitor.*

**CLAIMS OF MR. AND MRS. HAROLD R. LINDSAY AND  
BANKERS MUTUAL INSURANCE COMPANY, SUBROGEE**

**Tort Claim—Independent Contractor.**

The United States is not liable under the Federal Tort Claims Act for damage caused by an alleged negligent act of an employee of a person performing work for the Government as an independent contractor.

**M-34765**

**JUNE 9, 1947.**

Mrs. Harold R. Lindsay, 5407 Marlboro Pike, Washington 19, D. C., filed a claim on June 25, 1946, on behalf of herself and her husband in the amount of \$367.80 against the United States for compensation because of damage to their 1941 Buick sedan as a result of its being struck by a mowing machine owned by the National Park Service.

<sup>2</sup> See Departmental Order No. 2326, dated May 26, 1947 (12 F. R. 3567). [Editor.]

June 9, 1947

On October 24, 1946, the Bankers Mutual Insurance Company, Earle Building, Washington, D. C., with which Mr. Lindsay carried a \$100-deductible collision insurance policy on the car, filed a claim in the amount of \$294.90, which represented the actual cost of repairing the vehicle, less \$100. On October 30, 1946, Mrs. Lindsay reduced the amount of her claim to \$190, which represented the amount paid by the Lindsays towards the repair of the car and \$90 for loss of the use of the car for 9 weeks.

The question whether these claims should be paid under the Federal Tort Claims Act (28 U. S. C. sec. 921 *et seq.*) has been submitted to me for determination.

According to the record before me, the incident occurred about 2:10 p. m. on June 13, 1946, in front of 4800 Wisconsin Avenue, Washington, D. C. Immediately before the incident, the Park Service mowing machine, pulled by two horses rented from Kirk Turner, Falls Church, Virginia, was being driven along Fort Drive NW., at the Reno-Reservoir Road. The driver was Clifton Jackson, whose services, as well as those of the horses, were furnished by Mr. Turner pursuant to a contract with the National Park Service made under section 10 of the act of May 26, 1930 (16 U. S. C. sec. 17i). When the driver dismounted to pick up some paper which would have interfered with the blades of the mower, the horses escaped from his control, galloped to Wisconsin Avenue, and dragged the mower into contact with the Lindsay automobile, which was parked on the street.

The Federal Tort Claims Act limits the liability of the United States to damage "caused by the negligent or wrongful act or omission of any employee of the Government while acting within the scope of his office or employment." Clifton Jackson, who was in charge of the horses, was not the employee of the United States, but of Kirk Turner, with whom the National Park Service had made a contract covering, among other things, the services of a driver for the horses rented from Mr. Turner. The United States did not select Mr. Jackson, did not pay him, and it had no control over the amount which he was to be paid for his services. He was, therefore, the employee of an independent contractor. The Government is not liable where the damage was caused by the act of an independent contractor or his employee. *Cleo C. Reeves et al.*, Solicitor's determination, April 15, 1947 (M-34250); *Mrs. Lucile T. Swett*, Solicitor's opinion, December 2, 1944 (M-33859).

Therefore, in accordance with the provisions of the Federal Tort Claims Act and the authority delegated to me by the Secretary of the Interior (43 CFR 4.21; 12 F. R. 924), I determine that—

(a) The damage to the property of Mr. and Mrs. Harold R. Lindsay, upon which the claims are based, was not caused by the negligent

or wrongful act or omission of an employee of the United States Department of the Interior; and

(b) The claims of Mr. and Mrs. Harold R. Lindsay and Bankers Mutual Insurance Company, subrogee, must be denied.

MASTIN G. WHITE,  
*Solicitor.*

**CLAIMS OF MRS. MAUDE H. WALKER AND  
MISS MAUD H. WALKER, JR.**

**Tort Claim—Invitee.**

A visitor entering a national park maintained by the United States for the benefit of the public has the legal status of an invitee.

The Government is under a legal duty to exercise reasonable care for the safety of an invitee.

**T-32**

**JUNE 30, 1947.**

Mrs. Maude H. Walker and her daughter, Miss Maud H. Walker, Jr., 700 Fair Avenue, San Antonio 3, Texas, filed claims about October 10, 1946, in the amounts of \$138.90 and \$113.40, respectively, against the United States for compensation because of damage to clothing and other property as a result of the alleged negligence of employees of the National Park Service at Carlsbad Caverns National Park.

The question whether the claims should be paid under the Federal Tort Claims Act (28 U. S. C. sec. 921 *et seq.*) has been submitted to me for determination. This act authorizes the settlement of any claim against the United States on account of damage to property caused by a negligent or wrongful act or omission of an employee of the Government while acting within the scope of his employment, under circumstances where the United States, if a private person, would be liable to the claimant for such damage in accordance with the law of the place where the act or omission occurred.

According to the record before me, it appears that the Government conducts six tours daily through the Carlsbad Caverns, Carlsbad Caverns National Park, Carlsbad, New Mexico, and charges a fee for the tour. On September 1, 1946, the claimants were being conducted through the caverns on the 11:30 a. m. tour. Apparently, the electric lighting system was dim as the party, consisting of 198 persons, entered the caverns. Even so, the natural light streaming in from the outside made the first part of the trail visible and the party was conducted into the caverns. Three guides accompanied the party. The first points of interest on the tour are the "Auditorium," the "Devil's Den Spring," and the "Devil's Den." The lights were on at the

June 30, 1947

"Devil's Den," which is approximately 300 feet beyond the "Auditorium." However, the portion of the trail between the "Devil's Den Spring" and the "Devil's Den" was very dark, as the lead switches would not operate the lights. Mrs. Walker, who was traveling with the second half of the party, strayed from the trail at the "Devil's Den Spring" at a point where the trail has a slight curve, and she fell into a hole about 4 feet deep, which contained a pool of water. Miss Walker, who was walking arm-in-arm with her mother, either was pulled into the hole or else she leaped in to rescue Mrs. Walker.

The claims are based on the damage to the clothing worn by the claimants and to other personal property, such as their watches, cameras, and handbags, which they carried. This damage was caused not only by the water but also by the jagged edges of stones projecting from the sides of the hole.

A memorandum from the Superintendent of the Carlsbad Caverns National Park to the Regional Director, Region 3, dated October 1, 1946, states that—

\* \* \* Standing regulations have prevailed in Carlsbad Caverns National Park that guides were not to move parties in the event light failures occurred, and to keep the parties on the trail. These regulations I find have prevailed for many years.

The report of the Park Safety Committee covering this incident contains a recommendation that in the future no parties be moved into unlighted sections until adequate light is provided.

The legal status of the claimants was that of invitees to the caverns. The Government as the inviter owed a duty to the claimants of reasonable care and prudence for their safety. What constitutes due care on the part of an inviter is always determined by the circumstances and conditions surrounding the particular relationship under consideration. In the instant case, it was negligence for the Government guides to continue the tour beyond that part of the trail where there was adequate light, in view of existing regulations. The damage to the property of Mrs. Maude H. Walker resulted directly from this negligent conduct. *De Baca v. Kahn*, 161 P. (2d) 630 (N. Mex., 1945). The damage to the property of Miss Maud H. Walker, Jr., incurred as a result of assisting her mother, was a natural consequence of the mother's fall.

The valuation which Mrs. Maude H. Walker has placed on the specific items of her property that were damaged is reasonable. Therefore, she should be paid \$138.90.

The valuation which Miss Maud H. Walker, Jr., has placed on the items of her property that were damaged also is reasonable. She should be paid \$113.40.

## DETERMINATION AND AWARD

Therefore, in accordance with the provisions of the Federal Tort Claims Act and the authority delegated to me by the Secretary of the Interior (43 CFR 4.21; 12 F. R. 924)—

## 1. I determine that—

(a) The claims of Mrs. Maude H. Walker and Miss Maud H. Walker, Jr., accrued on September 1, 1946, and were presented in writing to the Department of the Interior within 1 year thereafter;

(b) The damage to the property of Mrs. Maude H. Walker and of Miss Maud H. Walker, Jr., on which the claims are based, amounted to \$138.90 and \$113.40, respectively;

(c) Such damage was caused by the negligent act or omission of an employee of the United States Department of the Interior while acting within the scope of his employment; and

(d) The United States, if a private person, would be liable to the claimant for such damage under the laws of the State of New Mexico, where the negligent act or omission occurred.

## 2. I award—

(a) To Mrs. Maude H. Walker the sum of \$138.90; and

(b) To Miss Maud H. Walker, Jr., the sum of \$113.40;

and I direct that these amounts be paid to them, subject to the availability of funds for such purpose.

MASTIN G. WHITE,  
*Solicitor.*

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The Governor of Alaska has power under the act of June 6, 1900 (31 Stat. 321; 48 U. S. C. secs. 61, 64), to grant reprieves for persons convicted of Territorial or Federal offenses, but his power is limited in either event to such time as the decision of the President is made known. The Governor of Alaska has no power to grant pardons -----

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See Secretary of the Interior, Authority, subheading Delegation of Functions, Marketing of Electric Power.

**ASSIGNMENTS**

See Federal Employees, subheading Application for Oil and Gas Lease; Inventions; Mineral Leasing Act, subheading Oil and Gas Leases; Secretary of the Interior, Authority, subheading Delegation of Functions, Marketing of Electric Power; Taylor Grazing Act and Lands, subheading Grazing Leases, Section 15.

**ASSISTANT SECRETARIES OF THE INTERIOR**

See Secretary of the Interior, Authority, subheading Delegation.

**AUTHORITY OF THE DEPARTMENT**

See Secretary of the Interior, Authority.

**AUTHORITY OF THE PRESIDENT**

See President's Authority.

**AUTHORITY OF THE SECRETARY**

See Secretary of the Interior, Authority.

**BASE LANDS**

See Taylor Grazing Act and Lands, subheading Grazing Leases, Section 15.

**BIDDING**

See Mineral Leasing Act, subheading Oil and Gas Leases, Bonds; subheading Oil and Gas Leases, Noncompetitive Lease; subheading Sodium Leases.

**BOATING**

See Indians and Indian Lands, subheading Columbia River Reservoir.

**BONDS**

See Mineral Leasing Act, subheading Oil and Gas Leases.

**BONNEVILLE POWER ADMINISTRATION**

See Federal Employees, subheading Collective Bargaining, Ungraded Employees; Inventions, subheading Federal Employees.

**BOUNDARIES**

See Indians and Indian Lands, subheading Allotment, subheading Columbia River Reservoir; Mineral Leasing Act, subheading Oil and Gas Leases, Known Geologic Structure; Public Lands, subheading Accretion, Riparian Ownership.

**BUREAU OF INDIAN AFFAIRS**

See Indians; Indians and Indian Lands; Indian Tribes; Oil and Gas Leases, Indian Lands; Secretary of the Interior, Authority, subheading Delegation.

**BUREAU OF LAND MANAGEMENT**

See Indians and Indian Lands, subheading Allotment, Rights-of-Way for Ditches or Canals; Mining Claim, subheading Concurring Decisions of Subordinate Adjudicating Officials on Questions of Fact; Tide and Submerged Lands.

**BUREAU OF MINES**

See Federal Employees, subheading Antistrike Affidavit; Inventions, subheading Federal Employees.

**BUREAU OF RECLAMATION**

See, also, Federal Employees, subheading Collective Bargaining; Federal Tort Claims, sub-

**BUREAU OF RECLAMATION—  
Con.**

heading Damage Covered by Insurance; Indians and Indian Lands, subheading Columbia River Reservoir; Inventions, subheading Federal Employees; Reclamation; Reclamation Withdrawal; Secretary of the Interior, Authority, subheading Delegation of Functions, Marketing of Electric Power.

**Archeological Excavations;  
Construction Funds; Davis  
Dam Project**

1. Funds appropriated for the construction of the Davis Dam project may be used to defray the cost of excavating archeological sites on lands owned by the Government in order to preserve from loss by flooding valuable relics belonging to the Government which would necessarily be lost otherwise as a result of the construction of the project and the spreading of the waters in the reservoir.....

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**Impounding of Waters****SURVEYS AND INVESTIGATIONS  
REGARDING EFFECTS ON  
WILDLIFE RESOURCES; FISH  
AND WILDLIFE SERVICE; CO-  
OPERATIVE AGREEMENTS**

2. Consultation with the Fish and Wildlife Service regarding effect which the impounding of waters will have upon wildlife resources must take place at early stage in the planning work on any reclamation project, prior to the authorization of the project in the technical sense.....

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3. Authority to determine whether, and to what extent, funds appropriated to the Bureau of Reclamation shall be transferred to the Fish and Wildlife Service for the making of surveys and investigations as to the probable effect

**BUREAU OF RECLAMATION—  
Con.**

Page

**Impounding of Waters—Con.**

upon wildlife resources of the impounding of waters is vested in the Secretary of the Interior.....

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4. The existence of authority in section 2 of the act of March 10, 1934, as amended, for the transfer of funds from the Bureau of Reclamation to the Fish and Wildlife Service for surveys and investigations does not prohibit the two Bureaus from entering into cooperative agreements under the Economy Act, with transfers of funds under such agreements from the Bureau of Reclamation to the Fish and Wildlife Service, for services to be performed by the latter in fields other than those specifically contemplated by section 2.....

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**CALIFORNIA, STATE OF**

See School Lands, subheading Indemnity Selections, Classification Under Section 7, Taylor Grazing Act.

**CANALS AND RESERVOIRS**

See Ditches, Canals, and Reservoirs.

**CANCELLATION**

See Homestead, subheading Soldiers' and Sailors' Civil Relief Act of 1940; Mineral Leasing Act, subheading Coal Prospecting Permits, subheading Oil and Gas Leases; Mining Claim, subheading Location; Taylor Grazing Act and Lands, subheading Grazing Leases, Section 15.

**CITIZENSHIP**

See Federal Employees, subheading Application for Oil and Gas Lease; Mineral Leasing Act, subheading Oil and Gas Leases, Preference-Right Leases.

**CIVIL SERVICE**

See Federal Employees, sub-  
heading Removal.

**CLAIMS AGAINST THE UNITED STATES**

See Federal Tort Claims.

**CLASSIFICATION**

See Indians and Indian  
Lands, subheading Uintah and  
Ouray Reservation, Utah; Min-  
eral Lands, subheading Valen-  
tine Scrip Location; Mineral  
Leasing Act, subheading Min-  
eral Classification; School  
Lands, subheading Indemnity  
Selections; Scrip; Taylor  
Grazing Act and Lands; With-  
drawal of Public Lands.

**COAL LANDS**

See Mineral Leasing Act,  
subheading Coal Leases; sub-  
heading Coal Prospecting Per-  
mits.

**COLLATERAL PROCEEDINGS**

See Mineral Leasing Act,  
subheading Coal Prospecting  
Permits.

**COLLECTIVE BARGAINING**

See Federal Employees.

**COLOR OF TITLE**

Conflicting Claims; Issuance of  
Patent

No patent may be issued un-  
der the Color of Title Act of  
December 22, 1928 (45 Stat.  
1069; 43 U. S. C. secs. 1068,  
1068a), for any tract to which  
there is a conflicting claim ad-  
verse to that of the applicant,  
unless and until such claim  
shall have been finally adjudi-  
cated in favor of such appli-  
cant -----

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**COLUMBIA RIVER RESERVOIR**

See Indians and Indian  
Lands.

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**COMMISSIONER OF THE GEN-  
ERAL LAND OFFICE**

See General Land Office.

Page

**COMMISSIONER OF INDIAN AF-  
FAIRS**

See Bureau of Indian Affairs.

**COMMISSIONER OF RECLAMA-  
TION**

See Bureau of Reclamation.

**CONFLICT**

See Color of Title; Home-  
stead, subheading Patent, Issu-  
ance of; Indians, subheading  
Restricted Property; Railroad  
Grant Lands; Taylor Grazing  
Act and Lands, subheading  
Grazing Leases, Section 15.

**CONGRESSIONAL GRANTS**

See School Lands.

**CONSERVATION OF NATURAL  
RESOURCES**

See President's Authority,  
subheading Delegation; Recla-  
mation, subheading Irrigation;  
School Lands, subheading In-  
demnity Selections, Effect of  
Taylor Grazing Act.

**CONSTITUTIONAL LAW**

Potassium Prospecting Permit  
Application; Denial

1. The denial of an applica-  
tion for a potassium prospect-  
ing permit does not constitute  
deprivation of property with-  
out due process of law -----

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Withdrawal Order; Potassium  
Prospecting Permit

2. A withdrawal order which  
neither enhances nor dimin-  
ishes existing rights does not  
deny equal protection of the  
laws to a prior applicant for a  
potassium prospecting permit. -----

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**CONSTRUCTION COSTS**

See Bureau of Reclamation;  
Indians and Indian Lands,  
subheading Flathead Irriga-  
tion Project, subheading Salt  
River Irrigation Project.

**CONTEST**

See Homestead, subheading Patent, Issuance of, subheading Residence, Final-Proof Requirements; Mining Claim.

**CONTIGUITY**

See Mineral Leasing Act, subheading Sodium Prospecting Permits; Mining Claim, subheading Common Improvements; Public Sale; Taylor Grazing Act and Lands, subheading Grazing Leases, Section 15.

**CONTRACTS**

See Federal Tort Claims, subheading Independent Contractor; Indians and Indian Lands, subheading Flathead Irrigation Project; Secretary of the Interior, Authority, subheading Delegation, Attorney Contracts with Indian Tribes.

**CONVEYANCES**

See Railroad Grant Lands.

**COURTS**

See Homestead, subheading Secretary's Duty to Protect Entryman; Indians and Indian Lands, subheading Allotment, Rights-of-Way for Ditches or Canals, subheading Osage Headrights; Mineral Leasing Act, subheading Oil and Gas Leases, Assignment, subheading Oil and Gas Leases, Non-competitive Lease; Public Lands, subheading Effect of State Decisions; Railroad Grant Lands.

**CULTURAL-COOPERATION PROGRAM**

See United States.

**DAMAGE CLAIMS**

See Federal Tort Claims.

**DAVIS DAM PROJECT**

See Bureau of Reclamation, subheading Archeological Excavations.

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**DECEASED OFFICERS OR EMPLOYEES**

Page

See Federal Employees.

**DECEDENT**

See Indians and Indian Lands, subheading Allotment, Sale, subheading Osage Headrights; Mineral Leasing Act, subheading Oil and Gas Leases, Preference-Right Leases.

**DEEDS**

See Life Estates; Mineral Leasing Act, subheading Oil and Gas Leases, Placer Mining Claim.

**DELEGATION OF AUTHORITY**

See Indian Tribes, subheading Delegation of Ministerial Functions; President's Authority; Secretary of the Interior, Authority.

**DEPARTMENTAL DETERMINATION**

See Public Lands, subheading Scrip Location; Secretary of the Interior, Authority.

**DEPARTMENT OF AGRICULTURE**

See Mineral Leasing Act, subheading Oil and Gas Leases, Acquired Lands.

**DEPARTMENT OF STATE**

See United States, subheading Government-Sponsored Training Programs.

**DESERT-LAND ENTRY**

See, also, Homestead.

**Withdrawals**

1. The act of March 28, 1908 (35 Stat. 52; 43 U. S. C. secs. 324, 326, 333), invites the occupancy and reclamation of unsurveyed desert lands, and acceptance of the invitation initiates an interest in the lands -----

2. One who takes possession of unreserved, unsurveyed des-

**DESERT-LAND ENTRY—Con.**

**Withdrawals—Con.**

ert land, who begins to reclaim it, and who is continuing his reclamation operations at the date of the inclusion of the land within a withdrawal, has initiated a valid claim upon which the withdrawal does not operate. The claim may be asserted by the filing of a proper desert-land application as soon as the lands are surveyed, if at that time the claimant is in possession of the lands and is complying with the appropriate regulations ---

3. The 90-day limitation in the act of March 28, 1908, giving a preference right of entry to qualified persons who performed certain acts on unsurveyed lands before they are surveyed, is intended for the protection of the right of desert-land claimants and homestead settlers as among themselves. In the absence of asserted adverse claims of desert-land reclamation or of homestead settlement, a desert-land claimant who, upon the filing of the plat of survey, fails to make timely assertion of his right of entry forfeits no rights and does not lose his lands because of a withdrawal not previously operative upon them -----

**DIRECTOR, BUREAU OF LAND MANAGEMENT**

See Bureau of Land Management.

**DIRECTOR, GEOLOGICAL SURVEY**

See Geological Survey.

**DIRECTOR, GRAZING SERVICE**

See Grazing Service.

**DIRECTOR, NATIONAL PARK SERVICE**

See National Park Service.

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**DISCOVERY**

See Mineral Leasing Act, subheading Oil and Gas Leases, subheading Sodium Prospecting Permits; Mining Claim; Withdrawal of Public Lands, subheading Mining Locations.

**DISCRETIONARY AUTHORITY OF THE SECRETARY**

See Secretary of the Interior, Authority.

**DITCHES, CANALS, AND RESERVOIRS**

See Bureau of Reclamation, subheading Archeological Excavations; Indians and Indian Lands, subheading Allotment, subheading Columbia River Reservoir, subheading Flathead Tribe; Reclamation, subheading Irrigation.

**DRAINAGE**

See Homestead, subheading Second Entry, Volstead Drainage Act; Mineral Leasing Act, subheading Oil and Gas Leases, Bonds.

**EASEMENTS**

See Indians and Indian Lands, subheading Columbia River Reservoir; Waters and Water Rights.

**ELECTRIC POWER**

See Power.

**EMPLOYEES**

See Federal Employees.

**ENTRY**

See Applications, subheading Restoration from Power-Site Withdrawal; Desert-Land Entry; Homestead; Indians and Indian Lands, subheading Allotment, Rights-of-Way for Ditches or Canals, subheading Flathead Tribe, Hunting on Pablo and Ninepipe Reservoir Sites; Reclamation Withdrawal, subheading Forest Reserve.

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**EQUITABLE ADJUDICATION**

See Homestead, subheading Reinstatement.

**EQUITABLE TITLE**

See School Lands, subheading Indemnity Selections; Title.

**EROSION**

See Reclamation, subheading Irrigation, Cover Crops.

**ESTATES**

See Indians and Indian Lands, subheading Osage Headrights; Life Estates.

**EVIDENCE**

See Homestead, subheading Residence; Mineral Leasing Act, subheading Coal Prospecting Permits; Mining Claim, subheading Contest, subheading Discovery.

**EXCHANGE OF LANDS**

See Indians and Indian Lands, subheading Alienation.

**EXHUMATION**

See Federal Employees, subheading Deceased Officers or Employees.

**FEDERAL EMPLOYEES**

See, also, Federal Tort Claims, subheading Independent Contractor; Inventions; Mineral Leasing Act, subheading Oil and Gas Leases, Interior Department Employees, subheading Known Geologic Structure; United States, subheading Government-Sponsored Training Programs.

**Alaska Road Commission****SALES OF WAREHOUSE STOCKS OF GROCERIES AND SUPPLIES**

1. In the absence of specific statutory authority, a proposed arrangement whereby the Alaska Road Commission would sell groceries and supplies from its warehouse stocks

Page

**FEDERAL EMPLOYEES—Con.**

Page

Alaska Road Commission—Con. to its employees for their personal use is forbidden----- 363

**Antistrike Affidavit**

2. Section 7 of the Interior Department Appropriation Act, 1947, does not require that antistrike affidavits be executed by employees of this Department. Insofar as the Appropriation Act is concerned, the execution of such an affidavit by an employee is merely provided for as a convenient method whereby he can establish his prima facie eligibility to draw his salary----- 306

3. The action of the Acting Secretary of the Interior in making the execution of an antistrike affidavit a prerequisite to continued employment in this Department represented a proper exercise of the administrative authority of the Secretary----- 306

4. The departmental requirement that an antistrike affidavit be executed by each employee of the Department can be waived by the Secretary in the case of a particular employee where it is otherwise clearly established that he has not struck against the Government, is not a member of an organization of Government employees that asserts the right to strike against the Government, and does not advocate, and is not a member of an organization that advocates, the overthrow of the Government by force or violence----- 306

**Application for Oil and Gas Lease; Assignments; Association Application**

5. It is against public policy for an employee of the Department of the Interior to acquire

**FEDERAL EMPLOYEES—Con.****Application for Oil and Gas Lease; Assignments; Association Application—Con.**

any interest in public land, including interests in oil and gas leases. No lease will, therefore, be issued to a departmental employee even though he had filed his application before he became employed, nor may he assign a mere application. The application having for many years been maintained in the employee's own name, it cannot be treated as an association application on behalf of those whom he now states he actually represented, since it did not comply with the regulations requiring disclosure of the names, addresses, citizenship, and interests of the members of the association. Generally, the Department recognizes only the holders of record in dealing with the various aspects of the lease or application-----

296

**Collective Bargaining; Ungraded Employees**

6. The bureaus and agencies of the Department have the right to bargain collectively with representatives of their ungraded employees on all matters within their discretion, and particularly with respect to wages and working conditions-----

292

**Deceased Officers or Employees**

**COSTS OF PREPARING THE REMAINS INCLUDE COSTS OF EXHUMATION; PERFORMANCE OF OFFICIAL DUTIES IN A TERRITORY OF THE UNITED STATES**

7. Under the act of July 8, 1940 (54 Stat. 743; 5 U. S. C. sec. 103a), the head of an executive department may pay

Page

**FEDERAL EMPLOYEES—Con.**

Page

**Deceased Officers or Employees—Con.**

not only the costs of transporting the remains of a deceased Government officer or employee but also those of "preparing the remains" for transportation-----

231

8. Under the act of July 8, 1940, *supra*, the costs of "preparing the remains" of a deceased officer or employee of the Government include the costs of exhumation. A contrary conclusion would defeat the purpose of the statute-----

231

9. The act of July 8, 1940, *supra*, as well as Executive Order No. 8557 of September 30, 1940 (5 F. R. 3888), applies even though a Federal officer or employee was hired or rehired in a Territory or possession of the United States, since the act presupposes merely "performing official duties in a Territory or possession of the United States"-----

231

10. The language of Executive Order No. 8557, *supra*, "while on assignment to a post outside the United States" is identical in meaning with the statutory language "while performing official duties in a Territory or possession of the United States"-----

231

11. Considering the purpose of the act of July 8, 1940, *supra*, it must be assumed that the President, by issuing Executive Order No. 8557, did not intend to limit the scope of that statute-----

231

**Removal; Civil Service Rule XII**

12. In the absence of a waiver by the Secretary of the departmental requirement that an antistrike affidavit be executed by each employee of this Department, the refusal of an

**FEDERAL EMPLOYEES—Con.**

Removal; Civil Service Rule XII—Con.

employee to execute the prescribed affidavit would constitute sufficient cause for a separation from the Service in accordance with Civil Service Rule XII-----

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**FEDERAL LAWS**

See Indians, subheading Restricted Property; Patents, subheading Interpretation in Accordance with Federal or State Law.

**FEDERAL OFFENSES**

See Alaska, subheading Reprives and Pardons.

**FEDERAL RANGE**

See Grazing and Grazing Lands; Taylor Grazing Act and Lands.

**FEDERAL TAXES**

See Taxes, Federal and State.

**FEDERAL TORT CLAIMS**

Damage Covered by Insurance; Administrative Adjustment; Insurance Subrogee

1. Where an insurance company informs claimant that it will not make payment for damage, the Department may pay such a claim, if it is otherwise meritorious, since there is no danger that the claimant will be compensated twice or that the Department will be required to make a second payment to the insurance company on the same claim-----

520

2. The claim of an insurance subrogee is recognized where actual payment for the damage or a portion of it has been made by the insurance company under a legal duty to the owner of the damaged property-----

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**FEDERAL TORT CLAIMS—Con.**

Page

Damage Covered by Insurance; Administrative Adjustment; Insurance Subrogee—Con.

3. The fact that damage is covered by insurance does not bar a right to payment under the Federal Tort Claims Act. If the claim is otherwise meritorious, it is paid to the insured if he has not collected from the insurance company, or to the insurance company to the extent that it has made payment to the insured-----

520

Independent Contractor

4. The United States is not liable under the Federal Tort Claims Act for damage caused by an alleged negligent act of an employee of a person performing work for the Government as an independent contractor-----

560

Invitee

5. A visitor entering a national park maintained by the United States for the benefit of the public has the legal status of an invitee-----

562

6. The Government is under a legal duty to exercise reasonable care for the safety of an invitee-----

562

**FEES**

See Secretary of the Interior, Authority, subheading Delegation, Attorney Contracts with Indian Tribes; Taylor Grazing Act and Lands, subheading Acreage Limitation, subheading Grazing Fees.

**FINAL CERTIFICATE**

See Homestead, subheading Patent, Issuance of.

**FINAL PROOF**

See Homestead.



**FINDINGS OF FACT**

See Taylor Grazing Act and Lands, subheading Authority of Director of Grazing Service.

**FISH AND WILDLIFE SERVICE**

See, also, Bureau of Reclamation, subheading Impounding of Waters; Indians and Indian Lands, subheading Columbia River Reservoir.

**Migratory Bird Treaty Act; Administrative Procedure Act**

Regulations under the Migratory Bird Treaty Act of July 3, 1918 (40 Stat. 755; 16 U. S. C. sec. 704), prohibiting the taking of migratory birds on privately owned lands, do not pertain to a "foreign affairs function" or to "public property," as those terms are used in section 4 of the Administrative Procedure Act (5 U. S. C. sec. 1003). The procedure prescribed in that section should be followed in connection with the issuance of such regulations.-----

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**FISHING**

See Indians and Indian Lands, subheading Columbia River Reservoir.

**FLORIDA, STATE OF**

See Fish and Wildlife Service, subheading Migratory Bird Treaty Act.

**FOREIGN NATIONALS**

See United States, subheading Government - Sponsored Training Programs.

**FORFEITURE**

See Desert-Land Entry, subheading Withdrawals; Homestead, subheading Soldiers' and Sailors' Civil Relief Act of 1940; Railroad Grant Lands.

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**FRANKLIN D. ROOSEVELT NATIONAL HISTORIC SITE**

See Life Estates.

Page

**FRAUD**

See Mineral Leasing Act, subheading Oil and Gas Leases, Applications, subheading Oil and Gas Leases, Cancellation, subheading Oil and Gas Leases, Holding by Undisclosed Trust; Mining Claim, subheading Location; Public Lands, subheading Accretion, Riparian Ownership.

**GAME REFUGE**

See Homestead, subheading Desert-Land and Enlarged Entries.

**GENERAL LAND OFFICE**

See Desert-Land Entry; Homestead; Indians and Indian Lands, subheading Allotment, Sale; Mineral Leasing Act, subheading Coal Prospecting Permits, subheading Oil and Gas Leases, Known Geologic Structure, subheading Oil and Gas Leases, Notice of Availability of Lands for Lease; Mining Claim; Public Sale, subheading Use of Improper Application Form; Taylor Grazing Act and Lands, subheading Grazing Leases, Section 15, Subleasing or Assignment.

**GEOLOGICAL SURVEY**

See Inventions, subheading Federal Employees; Mineral Leasing Act, subheading Mineral Classification, subheading Oil and Gas Leases, Known Geologic Structure.

**GOOD FAITH**

See Homestead, subheading Residence; Indians and Indian Lands, subheading Executive Order Reservations; Mining Claim.

**GOVERNMENT EMPLOYEES**

See Federal Employees.

**GOVERNMENT-SPONSORED  
TRAINING PROGRAMS**

See United States.

**GOVERNOR OF ALASKA**

See Alaska, subheading Re-  
prieves and Pardons.

**GOVERNOR OF PUERTO RICO**

See Puerto Rico, subheading  
Pocket Veto.

**GRANTS, CONGRESSIONAL**

See School Lands.

**GRAZING AND GRAZING LANDS**

See, also, Homestead, sub-  
heading Desert-Land and En-  
larged Entries; Indians and  
Indian Lands, subheading Ex-  
ecutive Order Reservations,  
subheading Leases and Per-  
mits; Taylor Grazing Act and  
Lands.

**Seasonal Use of Range**

1. Questions as to the sea-  
sonal use of the range are mat-  
ters peculiarly for considera-  
tion by the local officials.-----

**Use Prior to Taylor Grazing Act**

2. The use of public lands for  
grazing purposes prior to the  
enactment of the Taylor Graz-  
ing Act did not vest the grazier  
with any right either in the  
grazing or in the lands upon  
which the grazing was con-  
ducted; at most, it was a privi-  
lege enjoyed by the public gen-  
erally, revocable at the will of  
Congress, and terminated upon  
the enactment of the Taylor  
Grazing Act.-----

**Wrongful Use**

3. Wrongful use of grazing  
lands cannot be made the basis  
of any right to the further use  
of such lands.-----

**GRAZING SERVICE**

See Grazing and Grazing  
Lands; Inventions, subheading

Page

**GRAZING SERVICE—Con.**

Federal Employees; Taylor  
Grazing Act and Lands.

**GUARDIAN**

See Public Sale, subheading  
Preference Right of Adjoining  
Owner.

**GYPSUM**

See Mining Claim, subhead-  
ing Discovery.

**HEADRIGHTS**

See Indians and Indian  
Lands, subheading Osage Head-  
rights.

**HEARINGS**

See Homestead, subheading  
Patent, Issuance of; Mineral  
Leasing Act, subheading Oil  
and Gas Leases, Appeals; Prac-  
tice and Rules of Practice;  
Taylor Grazing Act and Lands,  
subheading Authority of Di-  
rector of Grazing Service.

**HEIRS AND DEVISEES**

See Indians and Indian  
Lands, subheading Allotment,  
Sale, subheading Osage Head-  
rights; Mineral Leasing Act,  
subheading Oil and Gas Leases,  
Preference-Right Leases.

**HISTORIC SITE**

See Life Estates.

**HOMESTEAD**

See, also, Desert-Land Entry;  
Public Lands, subheading Ac-  
cretion, Riparian Ownership,  
Survey.

**Contest Proceedings**

1. See subheading Resi-  
dence, Final-Proof Require-  
ments.

**Desert-Land and Enlarged En-  
tries; Withdrawals**

2. Desert-land and enlarged-  
homestead entries cannot be  
allowed on land withdrawn as  
a game refuge by an Executive  
order which reserved the land

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**HOMESTEAD—Con.**

Desert-Land and Enlarged Entries; Withdrawals—Con.

for the conservation and development of natural wildlife resources and for the protection and improvement of public grazing lands and natural forage resources. The withdrawn land has been segregated from the public domain and is not subject to private acquisition under the public-land laws-----

**Final Proof**

3. See subheading Patent, Issuance of; subheading Residence; subheading Soldiers' and Sailors' Civil Relief Act of 1940.

**Good Faith**

4. See subheading Residence. Military Service

5. See subheading Reinstatement; subheading Residence, Disabled World War I Veteran; subheading Residence, Double Residence; subheading Residence, Issuance of Patent; subheading Second Entry, Residence Requirements; subheading Soldiers' and Sailors' Civil Relief Act of 1940.

**Patent, Issuance of; Statute of Limitations**

See, also, subheading Residence; subheading Second Entry; subheading Survey and Resurvey.

6. Two years from the date of the issuance of the register's receipt upon the final entry of any tract of land under the homestead laws, the entryman is entitled to receive a patent without regard to whether a final certificate has been issued. The running of the 2-year period may be tolled, however, if within that time

Page

**HOMESTEAD—Con.**

Patent, Issuance of; Statute of Limitations—Con.

the entryman has received notice of a protest and appeared to seek its dismissal, even though the trial of the protest is not commenced within the 2-year period-----

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**Reinstatement; Equitable Adjudication**

7. Reinstatement of an entry is not granted in a case in which an entryman is not helped by the veterans' legislation and does not derive any support from the general statute concerning equitable adjudication (act of September 20, 1922, 42 Stat. 857; 43 U. S. C. sec. 1161), for the reason that the life of an entry, which is fixed by statute, may not be extended-----

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**Residence**

See, also, subheading Second Entry; subheading Soldiers' and Sailors' Civil Relief Act of 1940.

**DISABLED WORLD WAR I VETERAN: FINAL PROOF**

8. A World War I Veteran cannot claim the benefits of the act of August 27, 1935 (49 Stat. 909; 43 U. S. C. sec. 256b), if he incurred his disability after the life of his homestead entry had terminated-----

485

**DOUBLE RESIDENCE; GOOD FAITH**

9. The homestead law requires an entryman in good faith to establish his home on the entry but does not require that his wife and family reside on the entry with him or prohibit him from maintaining a second residence off the entry where his wife and family live. However, where an entryman

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## HOMESTEAD—Con.

## Residence—Con.

lives alone upon his entry and his family resides elsewhere, a rebuttable presumption is raised that the entryman has not in good faith established his residence upon the entry—

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10. Where the evidence shows that an entryman resided on his entry during the week and went to town only on week-ends to operate his barber shop and to visit his family which resided in town, that in 2 years he tilled half of the cultivable land in his entry, that he made progressive improvements on his entry, including the building of a habitable house at the time when he submitted final proof, and that he later sold his business to concentrate upon his entry, the presumption that he did not establish a residence upon the entry in good faith because he maintained a second residence off the entry is dispelled-----

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FINAL-PROOF REQUIREMENTS;  
CONTEST PROCEEDINGS

11. A charge of failure to establish residence is not sustained by evidence to the effect that the residence maintained was not of the character contemplated by the requirements of final proof-----

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## GOOD FAITH

12. The good faith of the entryman is the basic essential in determining whether residence has been established (*Slette v. Hill*, 47 L. D. 108), and the rule laid down in that case is in no way dependent upon the establishment of the elements of residence required for final proof, such as a habitable house-----

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## HOMESTEAD—Con.

## Residence—Con.

13. The determination whether an entryman has acted in good faith must be made in the light of all the circumstances of each particular case; and in this connection the amount of work done by the entryman on the homestead and his efforts to secure a well and to build a house are important-----

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14. The fact that the entryman had a shack on some other place; that as compensation for his work there he was to obtain a certain portion of that tract; and that the conditions under which he and his family stayed on the homestead were very primitive, are matters which, standing alone, would tend to raise doubts as to the good faith of the entryman in establishing his residence on the homestead but, when weighed with due regard to all the circumstances of the case, they are insufficient to establish lack of good faith on the part of the entryman-----

406

ISSUANCE OF PATENT; MILITARY SERVICE, WORLD WAR I VETERANS

15. Under the act of February 25, 1919 (40 Stat. 1161; 43 U. S. C. sec. 272a), the time of military service during World War I is deducted from the time otherwise required to perfect title, but residence of at least 7 months during a particular year (i. e., a consecutive period of 12 months) must be shown before patent can issue-----

485

## Second Entry

## RESIDENCE REQUIREMENTS

16. Failure of an entryman to meet the residence require-

**HOMESTEAD—Con.**

**Second Entry—Con.**

ments of a homestead is not excusable, so as to entitle him to make a second entry, where such failure is due to the fact that his occupation as a paleontologist in a university prevented him from residing on his entry. Such failure to reside is excusable, however, where caused by the entryman's engaging in military defense work under the Army engineers in time of war-----

226

17. An entryman who is entitled to 2 years' credit on residence because of military service may be permitted to make a second entry, although he never resided on the homestead during the life of the first entry, if he was prevented from residing on the land during the fifth year of the original entry by reason of employment in military defense work-----

226

**VOLSTEAD DRAINAGE ACT;  
WITHDRAWALS**

18. Where an applicant for a second homestead entry on land subject to the Volstead Drainage Act but withdrawn from homestead entry meets all the statutory requirements for making a Volstead entry and securing a Volstead patent, he has a right and the State in which the land is situated has a right to demand the issuance of a Volstead patent to the applicant-----

69

**Secretary's Duty to Protect Entryman**

19. Where a State court decision beclouds the title of the Federal Government to lands entered by a homestead entryman, the Department is under an obligation to its homestead entryman to protect his entry by appropriate action-----

416

**HOMESTEAD—Con.**

**Soldiers' and Sailors' Civil Relief Act of 1940; Entry Previously Canceled**

20. The benefits of the Soldiers' and Sailors' Civil Relief Act of 1940 (54 Stat. 1178, 1187; 50 U. S. C., App., sec. 561)—the nonforfeiture clause (section 501); the provision granting credit towards residence (section 502); and the provision permitting final proof without further residence (section 503 (2))—are not available to a person whose entry was canceled prior to the enactment of the Soldiers' and Sailors' Relief Act of October 17, 1940-----

485

**Survey and Resurvey; Effect on Patent**

21. Where a homestead entry is made on the basis of a patented survey plat, the redesignation of the land in a subsequent survey plat, approved between the date of the entry and the date of the patent, will not necessarily control in the interpretation of the patent; and the patent, where governed by the plat of earlier survey, is subject to reformation. (Secretary's Instructions, M-33711, June 20, 1946.)--

416

**Suspension of Entry Pending Segregative Survey**

22. Where the land within the record position of a homestead entry is partially submerged, partially owned by accretion to private riparian lands, and its title partially beclouded by the invalid claim of another alleged riparian owner, the entry will be suspended pending a segregative survey and the quieting of title to the Government's lands-----

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**HUNTING**

See Fish and Wildlife Service, subheading Migratory Bird Treaty Act; Indians and Indian Lands, subheading Columbia River Reservoir, subheading Flathead Tribe, Hunting on Pablo and Ninepipe Reservoir Sites.

**INDEMNITY**

See School Lands; Waters and Water Rights.

**INDIANS**

See, also, Indians and Indian Lands; Indian Tribes; Oil and Gas Leases, Indian Lands; Secretary of the Interior, Authority, subheading Delegation.

**Restricted Property; Oklahoma Community Property Act****FEDERAL LAWS; STATE LAWS; FEDERAL INCOME TAX; INCOME FROM RESTRICTED PROPERTY**

1. The restricted property of Indians is subject to the plenary control of the Federal Government----- 474

2. The States cannot prevent the application of acts of Congress to wards of the Federal Government domiciled therein. 474

3. Any conflict between the laws of a State and the laws of Congress relating to the Indians and their restricted property must be resolved against the State----- 474

4. The Oklahoma Community Property Act of 1945 vests in each spouse an undivided one-half interest in property acquired subsequent to marriage, or subsequent to July 26, 1945, whichever is later. It likewise vests in each spouse an undivided one-half interest in all income accruing after the marriage, or after July 26, 1945, whichever is later----- 474

5. With respect to the In-

**INDIANS—Con.****Restricted Property, etc.—Con.**

Indians of Oklahoma, the laws of Congress determine in whom an interest in restricted property shall vest, to whom the income from restricted property shall belong, and whether such income shall be subject to State income taxation----- 475

6. The Oklahoma Community Property Act conflicts with Federal laws relating to the Indians and their restricted property----- 475

7. The Oklahoma Community Property Act does not apply to the restricted property of Indians or to the income from such property----- 475

8. As a division of income between husband and wife for Federal income-tax purposes is not permissible unless that division is based upon a State law which vests in each spouse an undivided one-half interest in the income, the Indians in Oklahoma should be notified that each Indian must report all his income from restricted property on his own return and that it would be improper for one-half of that income to be reported by his spouse----- 475

9. The income of married Indians from unrestricted sources may be reported to the Federal Government as community income because as to that income the Indian is as much subject to the law of the State as are its non-Indian citizens----- 475

**INDIANS AND INDIAN LANDS**

See, also, Homestead, subheading Second Entry, Volstead Drainage Act; Indians; Indian Tribes; Oil and Gas Leases, Indian Lands; Secretary of the Interior, Authority, subheading Delegation.

## INDIANS AND INDIAN LANDS—

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## Alienation

RESTRICTED OR TRUST LANDS,  
EXCHANGE; TAX-EXEMPTION STATUS

1. The act of June 30, 1932 (47 Stat. 474), authorizes the sale and purchase, but it does not prohibit the exchange, of restricted or trust Indian lands for other lands of the Indian's selection so long as the Indian receives equivalent value. The consideration need not be in money. It may be money's worth. Lands so acquired under the act of June 30, 1932, *supra*, are restricted against alienation, lease, or incumbrance, and nontaxable in the same quantity and upon the same terms and conditions as the trust lands exchanged therefor-----

28

## Allotment

OKLAHOMA INDIAN WELFARE  
ACT; ORGANIZATION

2. The organization of the Iowa, Sac and Fox, and Cheyenne and Arapaho Indians under the Oklahoma Indian Welfare Act did not affect the status of allotted lands within the boundaries of their former reservations which had been dissolved by agreements of cession duly ratified by the Congress-----

1

## RIGHTS-OF-WAY

3. Lands allotted to Indians of the Iowa, Sac and Fox, and Cheyenne and Arapaho Tribes are not reservation lands within the meaning of the acts of February 15, 1901 (31 Stat. 790; 43 U. S. C. sec. 959), and March 4, 1911 (36 Stat. 1253; 43 U. S. C. sec. 961), which au-

## INDIANS AND INDIAN LANDS—

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## Allotment—Con.

thorize the Secretary to issue grants of rights-of-way over certain lands-----

1

RIGHTS-OF-WAY FOR DITCHES  
OR CANALS; RESERVATION  
IN INDIAN PATENTS

4. As it is not certain whether Congress intended for the Department to reserve rights-of-way for ditches or canals in patents to lands which were in the public domain as of August 30, 1890, but which were subsequently incorporated in Indian reservations and are being distributed by allotment to individual Indians, there is leeway for a reasonable administrative construction of the right-of-way provision in the act of August 30, 1890-----

461

5. The previous administrative construction of the right-of-way provision, to the effect that when an Indian reservation has been carved out of the public domain since August 30, 1890, and is to be distributed by allotment to individual Indians, such land is subject to the right-of-way for ditches or canals reserved by the Government, is not unreasonable, and, if adhered to in the future, would not be upset by the courts-----

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6. The legislative history of the right-of-way provision in the act of August 30, 1890, indicates that Congress probably intended for it to relate only to patents issued in recognition of rights acquired in public domain lands through occupation, entry, or settlement, and not to the distribution of Indian reservation lands among individual Indi-

# INDIANS AND INDIAN LANDS— Con.

## Allotment—Con.

ans. Hence, the Department could properly adopt such an administrative construction of the legislation at the present time for application in the issuance of future patents, notwithstanding the contrary construction heretofore followed by the Department -----

## SALE; PATENTS IN FEE; RESERVATIONS OF MINERALS

7. The Secretary of the Interior is authorized to sell the allotted lands of deceased Indians by the act of June 25, 1910 (36 Stat. 855), as amended (25 U. S. C. secs. 372, 373) -----

8. The Secretary of the Interior may sell such allotments without the consent of the heirs or devisees, under such rules and regulations and upon such terms as he may prescribe -----

9. The authority of the Secretary of the Interior to cause the entire allotment of a deceased Indian to be conveyed by patent necessarily includes the authority to cause a lesser interest therein, the surface only, to be conveyed by patent -----

10. Upon payment of the purchase price, the Secretary of the Interior may direct the Commissioner of the General Land Office to issue patents in fee to the purchasers of the lands, such patents to contain reservations of the minerals in favor of the heirs or devisees of the deceased allottees -----

## Boating

11. See subheading Columbia River Reservoir.

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# INDIANS AND INDIAN LANDS— Con.

Cheyenne and Arapaho, Iowa, and Sac and Fox Indians

12. See subheading Allotment.

## Columbia River Reservoir

### HUNTING, FISHING, AND BOATING RIGHTS

13. The second paragraph of section 1 of the act of June 29, 1940 (54 Stat. 703), imposes a mandatory duty upon the Secretary to set aside approximately one-quarter of the entire reservoir area for the paramount use of the Indians of the Spokane and Colville Reservations -----

14. Although the act in terms permits the Secretary to set aside one or more areas for Indian use, it also makes separate provision for two different tribes of Indians. The Secretary is, therefore, required to allocate at least one area to each of the two tribes. While he may also set aside more than two areas, his power is limited by a rule of reason which would prevent him from setting aside so many areas that he would bring about the very evil which the statute was designed to prevent. The object of the statute was, so to speak, to secure a consolidation of the areas of Indian interest -----

15. The interest of the Colville and Spokane Indians in one-quarter of the reservoir area is not joint but several. In view of the failure of the statute to prescribe a formula for dividing between the two tribes the 25 percent of the reservoir area to be set aside for both of them, the Secretary may make the apportionment in such a manner as will be

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equitable under all the circumstances. However, the ratio that was employed in determining the percentage of the entire reservoir area that was to be set aside for both tribes could reasonably be applied in determining the share of each tribe. This ratio was obtained by comparing the length of the original river shore line of Indian lands acquired or to be acquired for the reservoir with the total original shore line of the river in the reservoir area. The result would also be in harmony with the relative populations of the Colville and Spokane Indian Reservations -----	148	board areas in the areas set aside for the Indians because (a) the Indians are given hunting rights which can also be enjoyed on the shorelands; (b) the "entire" reservoir area is made the basis for calculating the Indians' share; (c) the rights of access to the Indian reservoir areas are granted only "when necessary" -----	148
16. While the Secretary has discretion in the location of the Indian areas, his discretion in this respect is limited by the requirement that the areas set aside for the Indians be readily accessible to them. The Indian areas must, therefore, be located in reasonable proximity to the Indian lands, namely, adjacent to such lands. The application of this rule would require the location of the Indian areas along the former shore line of Indian lands. However, in view of the scope of the Secretary's discretion, he is under no duty to locate the Indian areas within the exterior boundaries of the reservations as they existed prior to the construction of the reservoir ----	148	18. The special rights given to the Indians under the act are expressly limited to hunting, fishing, and boating. These rights are not enlarged by the "access" provision of the act, since a right of access is not a separate and independent right but a means of enjoying property rights or special rights otherwise possessed. However, the rights of access are not limited to mere rights of ingress and egress but are commensurate with the purposes to which the portions of the reservoir to be set aside for the Indians are to be put ----	148
17. The Secretary is not confined to setting aside one-quarter of the water surface of the reservoir for the use of the Indians. He may include free-		19. No special rights inure to the Indians from any other source. By virtue of the act of July 1, 1892 (27 Stat. 62), the southern and eastern boundary of the Colville Reservation extends to the middle of the channel of the Columbia River. By the Executive order of January 18, 1881, the bed of the Spokane River to the south bank thereof was included in the Spokane Indian Reservation. Even if it be assumed that the titles to the beds of the Columbia and Spokane Rivers were not taken and extinguished under the act	

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of June 29, 1940, it cannot be made a source of additional special rights for the Indians. The special rights accorded to the Indians by the act are plainly denominated lieu rights. They are, therefore, to be deemed an exclusive substitute for whatever rights the Indians may have enjoyed prior to the enactment of the statute by reason of their rights of ownership -----

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20. However, the Indians are not confined to those parts of the reservoir set aside for their "paramount" use. In such areas of the reservoir they will enjoy special rights. But in the reservoir as a whole, insofar as they may have access to it, they may enjoy such privileges as are accorded to the general public in navigable waters, which include those of hunting and fishing, floating logs, and navigation. The Indians may also take advantage of section 10 of the act of August 4, 1939 (43 U. S. C. sec. 387), which gives the Secretary power to grant leases, licenses, easements, or rights-of-way over lands acquired and administered under the Federal reclamation laws -----

149

21. Since the act declares that the areas set aside for the Indians shall be for their "paramount" use for hunting, fishing, and boating, such use is neither exclusive of the same use by other persons, nor exclusive of any other use by other persons. However, the Secretary is under a duty to maintain the paramount character of the Indian use, and if he

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finds that this can be accomplished only by according the Indians exclusive rights in the areas set aside for them, he is empowered to do so. He may make such rights exclusive in all parts of the Indian areas, or at particular locations, or at particular times, or give greater freedom to the Indians in making use of the reservoir than is permitted to others.-----

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22. Since the rights of the Indians will not necessarily be exclusive, there is no present need to decide whether the Indians may license others to enjoy their rights.-----

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HUNTING, FISHING, AND  
BOATING RIGHTS; ADMIN-  
ISTRATION OF RESERVOIR  
AREA

23. Although the Bureau of Reclamation, the Bureau of Indian Affairs, the National Park Service, and the Fish and Wildlife Service are all interested in the Columbia River Reservoir area, its administration is vested in the Secretary of the Interior rather than in any particular bureau, and the Secretary, by virtue of section 161 of the Revised Statutes (now 5 U. S. C. sec. 22), may select any one or more of the interested agencies to administer any part of the reservoir area.-----

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HUNTING, FISHING, AND  
BOATING RIGHTS; CONSTITUTIONALITY OF REGULATORY PROVISION OF THE ACT  
OF JUNE 29, 1940

24. There is no good reason to doubt the constitutionality of the provision of the act, which gives the Secretary of

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the Interior authority to pre-		MINERAL OWNERSHIP	
scribe reasonable regulations		28. The historical back-	
for the protection and conser-		ground shows that the inten-	
vation of fish and wildlife in		tion of the Executive Order of	
the areas set aside for Indian		December 16, 1882, was to	
use. The constitutionality of		create the reservation for the	
the act is supported by the		Hopi Indians and for the	
property interests of the		Navajo Indians then living	
United States in the reservoir		within the area, with the	
area, the power of Congress to		further settlement of Navajos	
control the navigable waters		to be permitted in the discre-	
of the United States, and the		tion of the Secretary. Under	
powers of Congress over In-		this construction, it is held	
dians and Indian affairs.....	149	that the Hopi Indians and	
Colville Reservation		those Navajos within the area	
25. See subheading Colum-		who settled in good faith prior	
bia River Reservoir.		to the date of ratification of	
Delegation of Ministerial Func-		the Hopi constitution have co-	
tions to Indian Tribes		extensive rights with respect	
26. See subheading Leases		to the natural resources of the	
and Permits.		reservation, including the min-	
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Hopis and Navajos		USE AND OCCUPANCY; TITLE	
MINERAL LEASES; DEPART-		29. The Executive order of	
MENTAL RECOGNITION OF		December 16, 1882, set aside	
TRIBAL REPRESENTATIVES		certain lands for the use and	
27. Under the act of May 11,		occupancy of the Hopi Indians	
1938 (52 Stat. 347; 25 U. S. C.		"and such other Indians as	
secs. 396a-f), lands within the		the Secretary of the Interior	
Hopi Executive Order Reser-		may see fit to settle thereon."	
vation may be leased for min-		At that time, and for years	
ing purposes, with approval of		prior thereto, the lands were	
the Secretary, by authority of		occupied by the Hopi Indians	
the Hopi Tribal Council and		and by Navajo Indians, and	
the duly authorized representa-		Navajos continued thereafter	
tives of the Navajos having		to settle within the area.....	248
rights within the reservation.		30. Funds appropriated for	
The preparation of a roll iden-		Federal services, such as the	
tifying the individual Indians		education of Indian children,	
entitled to participate in the		have been used throughout the	
mineral estate is unnecessary		years for the benefit of Hopis	
unless it is intended that the		and Navajos living within the	
proceeds of mineral leasing be		area, and the Secretary has	
individualized.....	248	regulated the grazing of the	
		livestock on the reservation	
		belonging to Hopis and Nav-	
		ajos, no action being taken to	

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prevent the further settlement of Navajos until the Secretary declared that Navajo Indians would not be permitted to settle on the reservation after the date of ratification of the Hopi constitution -----	248	35. Power development has always been an integral part of the irrigation project system....	31
Fishing		36. The term "construction costs," as employed in the Flathead project legislation, includes all construction costs....	31
31. See subheading Colum- bia River Reservoir.		37. To exclude power costs from construction costs would, in effect, make the former a de- ferred obligation, but the only such obligation specifically de- ferred is the excess cost of the Camas division of the project. The fact that the legislation provides that the power con- struction costs are to be liqui- dated first from the net power revenues is of no significance, since various other obligations were also to be liquidated from these revenues, including irri- gation construction costs.....	31
Flathead Irrigation Project		38. The lien provisions of the legislation apply to power as well as irrigation construction costs and are not contingent on lack of power revenue.....	31
LEGISLATION; REPAYMENT CONTRACT REQUIREMENTS; INCLUSION OF POWER COSTS IN CONSTRUCTION COSTS		39. The directions in the leg- islation for the issuance of a public notice refer to "the total unpaid construction costs"-----	31
32. The provisions of the re- payment contracts between the United States and the Flat- head irrigation district, the Jocko Valley irrigation district, and the Mission irrigation dis- trict, which limit construction costs to specified amounts per acre but include power de- velopment costs as part of the construction costs of the Flat- head irrigation project, are in harmony in this respect with the acts of Congress in accord- ance with which the project was built-----	30	40. The maintenance of a separate bookkeeping account for power is also of no signifi- cance, since power revenues are set aside for certain purposes....	31
33. Neither the language of the Flathead project legislation nor its legislative or depart- mental history reveals any in- tention to segregate power con- struction costs from irrigation construction costs, so far as the repayment contract re- quirements of the legislation are concerned-----	31	41. The fact that the power development is capable of con- tinuous expansion only demon- strates the desirability of limit- ing the power costs-----	31
34. The approval of the re- payment contracts by the De- partment constitutes a prac- tical contemporaneous con- struction of the requirements of the legislation-----	31	42. Repayment contract re- quirements of irrigation legis- lation should be strictly con- strued to insure the reimburse- ment of the Government-----	31

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43. Since the cost limitations on the Flathead and Mission Valley divisions of the project have already been exceeded, no further construction may be undertaken without securing supplemental repayment contracts with these districts----	31
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HUNTING ON PABLO AND NINEPIPE RESERVOIR SITES; JURISDICTION OF TRIBAL COUNCIL TO REGULATE; SURPLUS LANDS; WITHDRAWALS AS RESERVOIR SITES	
44. The Flathead Tribal Council does not have jurisdiction to regulate hunting within the Pablo and Ninepipe Reservoir areas. The reservoir areas are part of the surplus lands opened to settlement and entry pursuant to the act of April 23, 1904 (33 Stat. 302); and the act of March 3, 1909 (35 Stat. 796), expressly authorized the reservation of lands within the Flathead Reservation chiefly valuable for reservoir sites. The selection of such sites and their use for reservoir purposes amounted to the taking by the United States of such an interest in the lands as to be inconsistent with the continued jurisdiction of the tribe to regulate hunting in the reservoir areas-----	346
Fort Belknap Community	
45. See subheading Leases and Permits.	
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46. See subheading Allotment, Sale; subheading Osage Headrights.	

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47. See subheading Executive Order Reservations.	
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49. See subheading Allotment.	
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DELEGATION OF MINISTERIAL FUNCTIONS TO INDIAN TRIBES; TRIBAL LEASING CLERK	
50. An Indian tribe, whether incorporated or unincorporated, may take over, through a tribal leasing clerk, the clerical and ministerial details involved in the leasing of tribal and individual lands-----	328
DELEGATION OF MINISTERIAL FUNCTIONS; TRIBAL ENTERPRISES; ANNUAL APPROPRIATION ACT	
51. The clerical and ministerial details which would be involved in the leasing and permitting of Indian lands are not prescribed by most of the leasing statutes. To the extent that they are prescribed, they may nevertheless be delegated to an Indian tribe, which for this purpose may be regarded as an instrumentality of the United States. The express statutory power of the Secretary of the Interior to establish tribal enterprises under appropriate regulations, which exists under the annual Appropriation Act, further supports such delegation-----	329

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## Leases and Permits—Con.

### TRIBAL LEASING CLERK; SECTION 3679, REVISED STATUTES

52. Insofar as the Department has a function to perform in connection with the leasing and permitting of Indian lands, the indirect benefit to the Department from the activities of the tribal leasing clerk would not contravene section 3679 of the Revised Statutes, as amended by the act of February 27, 1906 (34 Stat. 27, 48; 31 U. S. C. sec. 665), which provides that officers of the Government shall not accept voluntary services-----

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## Minerals

53. See subheading Allotment, Sale; subheading Executive Order Reservations; subheading Osage Headrights; subheading Uintah and Ouray Reservation, Utah.

## Navajo Tribe

54. See subheading Executive Order Reservations.

## Oil and Gas Leases

55. See Oil and Gas Leases, Indian Lands.

## Oklahoma Community Property Act of 1945

56. See Indians, subheading Restricted Property.

## Oklahoma Indian Welfare Act; Organization

57. See subheading Allotment.

## Osage Headrights

### DECEDENTS' ESTATES AND ANCILLARY ADMINISTRATION

58. An Osage headright, owned by a non-Indian, represents the non-Indian's right to

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## Osage Headrights—Con.

participate in the distribution of the bonuses and royalties accruing from the mineral estate owned by the Osage Tribe-----

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59. The right to receive the payments accruing to an Osage headright, after they have been segregated from the tribal funds, is analogous to any debt due from the United States.---

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60. The payments accruing to the headright have no situs in Oklahoma-----

103

61. Ancillary administration in Oklahoma of the estate of a deceased non-Indian owner of an Osage headright is unnecessary-----

103

62. The Secretary of the Interior may recognize a decree of a court of competent jurisdiction of the State of domicile of a non-Indian owner of an Osage headright as vesting title to the headright in the heirs or beneficiaries under a will found by that court to be entitled thereto-----

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63. The payments accruing after the death of the non-Indian owner and during the course of administration of his estate should be paid to the administrator or executor duly appointed and qualified under the laws of the State of domicile-----

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## Patents in Fee

64. See subheading Allotment, Sale.

## Restricted Property; Oklahoma Community Property Act

65. See Indians.

## Restricted or Trust Lands, Exchange

66. See subheading Alienation.

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**Rights-of-Way**

67. See subheading Allotment; subheading Columbia River Reservoir.

**Royalties**

68. See subheading Osage Headrights.

Sac and Fox, Iowa, and Cheyenne and Arapaho Indians

69. See subheading Allotment.

**Sale of Trust or Restricted Lands**

70. See Secretary of the Interior, Authority, subheading Delegation.

**Salt River Irrigation Project**

SUBJUGATION WORK; CONSTRUCTION COSTS; DEFERMENT UNDER LEAVITT ACT

71. The appropriation of \$30,000 for "construction, repair, and rehabilitation" on the Salt River project made by the act of June 28, 1944 (58 Stat. 463, 476), may be used for subjugation of Indian lands under the project. In view of the legislative history of this item, the general practice in recent years in performing subjugation work on Indian projects, and the somewhat artificial character of the distinction between "construction" costs and other types of cost, the funds expended for construction work on the Salt River project may be treated as deferable construction costs under the Leavitt Act of July 1, 1932 (47 Stat. 564; 25 U. S. C. sec. 386a)-----

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**Spokane Reservation**

72. See subheading Columbia River Reservoir.

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**Taxation**

73. See subheading Alienation; Indians, subheading Restricted Property.

**Tribal Rolls**

74. See subheading Executive Order Reservations.

**Trust or Restricted Lands, Sale of**

75. See Secretary of the Interior, Authority, subheading Delegation.

**Uintah and Ouray Reservation, Utah**

ORDER RESTORING LANDS TO TRIBAL OWNERSHIP; MINERALS RESERVED TO THE UNITED STATES

76. The order of August 25, 1945, restoring to tribal ownership "all lands which are now or may hereafter be classified as undisposed-of opened lands of the Uintah and Ouray Reservation" includes minerals reserved to the United States under patents issued for the surface of the opened lands of the reservation-----

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**INDIAN TRIBES**

See, also, Indians; Indians and Indian Lands; Oil and Gas Leases, Indian Lands; Secretary of the Interior, Authority, subheading Delegation.

**Delegation of Ministerial Functions; Tribal Leasing Clerk**

1. An Indian tribe, whether incorporated or unincorporated, may take over, through a tribal leasing clerk, the clerical and ministerial details involved in the leasing of tribal and individual lands-----

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**INDIAN TRIBES—Con.****Flathead Tribe**

2. See Indians and Indian Lands, subheading Flathead Tribe, Hunting on Pablo and Ninepipe Reservoir Sites.

**Hopi Tribe**

3. See Indians and Indian Lands, subheading Executive Order Reservations.

**Iowa, Sac and Fox, and Cheyenne and Arapaho Tribes**

4. See Indians and Indian Lands, subheading Allotment.

**Navajo Tribe**

5. See Indians and Indian Lands, subheading Executive Order Reservations.

**Osage Tribe**

6. See Indians and Indian Lands, subheading Osage Headrights.

**INSURANCE**

See Federal Tort Claims, subheading Damage Covered by Insurance.

**INTERIOR DEPARTMENT EMPLOYEES**

See Federal Employees.

**INVENTIONS****Federal Employees**

DATE OF INVENTION; ORDER No. 1763

1. An invention, the utility of which was visualized in 1937 but which was not completely conceived until 1945, was made after the issuance of Departmental Order No. 1763 of November 17, 1942, and is subject to its provisions-----

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2. An invention, the possibilities of which were considered in 1940 but which was not disclosed to others or reduced to practice until November 1944, is subject to Departmental Order No. 1763 of November 17, 1942-----

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**INVENTIONS—Con.**

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**Federal Employees—Con.**

DEVELOPMENT; ASSIGNMENT TO GOVERNMENT REQUIRED

3. Reduction of an invention to practice by the construction of models on Government time, using Government materials, is such a substantial development of an invention on Government time, through the use of Government materials and financing, as to require its assignment to the Government under Order No. 1763-----

220

4. An invention is required to be assigned to the Government if it is substantially developed on Government time, using Government facilities---

89

DEVELOPMENT; ASSIGNMENT TO GOVERNMENT NOT REQUIRED

5. The use of Government items of insignificant value by an inventor in the development of his invention is not such a substantial development of the invention with Government facilities or financing as to require the assignment of the invention to the Government under Order No. 1763-----

12

DEVELOPMENT; DUTIES; ASSIGNMENT TO GOVERNMENT NOT REQUIRED

6. An invention conceived during working hours is not required to be assigned to the Government if the inventor's duties do not include research or investigation, and the invention was developed on the inventor's own time, using his own materials-----

98

DEVELOPMENT; RESEARCH OR INVESTIGATION; ASSIGNMENT TO GOVERNMENT NOT REQUIRED

7. Reduction to practice by the Government, for its own



**INVENTIONS—Con.**

**Federal Employees—Con.**

benefit, of an invention completely conceived and sketched by an employee on his own time, without the use of Government materials or financing, is not a substantial making or development of the invention through the use of Government facilities or financing, or on Government time, within the meaning of Departmental Order No. 1763 of November 17, 1942

275

8. An employee of the Department of the Interior, not engaged in investigation or research, is not required by Departmental Order No. 1763 of November 17, 1942, to assign to the Government an invention made on his own time, with his own facilities

276

**DUTIES ; ASSIGNMENT TO GOVERNMENT REQUIRED**

9. The invention of a Drum Hoist which will increase mining efficiency, made by an engineer assigned to engage in research upon the subject in the course of his investigations, is relevant to the general field of his duties, and is required to be assigned to the Government

88

10. The invention of an instrument used to obtain stereoscopic views of paired aerial photographs by an employee of the Interior Department (Geological Survey), whose position requires research and the supervision of research into processes and instruments for making maps, is within the general scope of his governmental duties, under Order No. 1763

220

11. An invention made by an employee of the Interior Department within the general scope of his governmental du-

**INVENTIONS—Con.**

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**Federal Employees—Con.**

ties is required to be assigned to the Government

220

12. An industrial engineer who develops a Low Temperature Dehydrator for Bulk Materials in the course of assigned duties of conducting research into the development of new uses for electric power and engaging in studies upon the dehydration and concentration of foods is required to assign it to the Government under Order No. 1763

242

**DUTIES ; ASSIGNMENT TO GOVERNMENT NOT REQUIRED**

13. The invention of improved color standards by an employee of the Interior Department (Geological Survey) engaged in potash research who uses such standards incidentally in his work is not so related to his assigned duties of research as to require its assignment to the Government under Departmental Order No. 1763 of November 17, 1942

12

14. A Hydraulic Compressor invented in his spare time by an engineer employed by the Bonneville Power Administration, whose usual duties consisted of preparing specifications and bid forms for high-tension electric transmission lines, is not required to be assigned to the Government under Departmental Order No. 1763 of November 17, 1942

125

15. The invention of a Device for Plotting Mathematical Curves is not a part of the work of an electrical engineer whose duties consist of making layout and arrangement drawings of electrical equipment from data supplied by others, and is not relevant to the general field of his assigned inquiries

229

## INVENTIONS—Con.

## Federal Employees—Con.

16. An invention made on his own time without the use of Government materials, financing, or information not available to the public, and not in the course of assigned duties of research or investigation, by an electrical engineer employed by the Interior Department, is not required to be assigned to the Government under Departmental Order No. 1763 of November 17, 1942-----

229

## DUTIES; RESEARCH OR INVESTIGATION

17. Research and investigation form part of the duties of a construction engineer who is required to give advice upon "improvements in construction plant to obtain greater efficiency of operation"-----

89

18. A mining engineer, whose duties include the solution of engineering problems affecting mine production, is engaged in research or investigation, within the meaning of Departmental Order No. 1763-----

87

19. An industrial engineer employed by the Bonneville Power Administration is engaged in research or investigation, within the meaning of Departmental Order No. 1763 of November 17, 1942, if his duties require him to assist in the development of new industrial uses for electric power and to engage in studies concerning electrical applications in production processes-----

241

20. An employee of the Interior Department is engaged in research or investigation, within the meaning of Order No. 1763, even though his work normally requires him merely to apply known principles to practical problems, if good

## INVENTIONS—Con.

## Federal Employees—Con.

craftsmanship and professional competence require him to engage in research or investigation in an effort to reach an adequate solution to a practical problem confronting him-----

241

21. The duties of a power-shovel operator do not require research or investigation or the supervision of research or investigation-----

275

## DUTIES; RESEARCH OR INVESTIGATION; ASSIGNMENT TO GOVERNMENT REQUIRED

22. An inventor whose duties include research and investigation into more efficient construction methods at the dam where he is employed, who invents a method for producing a better surfaced concrete for use at the dam, is required to assign his invention to the Government under Order No. 1763-----

89

## DUTIES; RESEARCH OR INVESTIGATION; ASSIGNMENT TO GOVERNMENT NOT REQUIRED

23. An invention conceived during working hours is not required to be assigned to the Government if the inventor's duties do not include research or investigation, and the invention was developed on the inventor's own time, using his own materials-----

98

## GOVERNMENT'S RIGHT TO USE

24. Whether or not an inventor employed by the Interior Department (Bureau of Reclamation), who makes an invention while so employed, files a patent application under the act of March 3, 1883, as amended (35 U. S. C. sec. 45), the Government is immune from suit for the use of

**INVENTIONS—Con.**

**Federal Employees—Con.**

the invention and is prohibited from paying him royalties for its use under the act of June 25, 1910 (36 Stat. 851), as amended by the act of July 1, 1918 (40 Stat. 705; 35 U. S. C. sec. 68)-----

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25. The Government is immune from suit for the use of any patented invention made by an employee of the Interior Department, and is prohibited from paying royalties for the use of his invention under the act of June 25, 1910 (36 Stat. 851), as amended by the act of July 1, 1918 (40 Stat. 705; 35 U. S. C. sec. 68)-----

276

**MILITARY FURLOUGH; ASSIGNMENT TO GOVERNMENT NOT REQUIRED**

26. An invention made by an employee of the Interior Department (Bonneville Power Administration) while on military furlough, which did not arise in the course of assigned departmental research, was not made or developed with departmental facilities or financing, or on departmental time, or with information not available to the public obtained through the inventor's employment with the Department, is not required to be assigned to the Government under Departmental Order No. 1763 of November 17, 1942-----

127

**ORDER NO. 1763; INVENTION MADE WHILE ON LEAVE**

27. Order No. 1763 is applicable to an invention made on leave, whether annual or without pay-----

220

**ORDER NO. 1763; VALIDITY**

28. Departmental Order No. 1763 of November 17, 1942, is a valid exercise of the Secre-

**INVENTIONS—Con.**

**Federal Employees—Con.**

tary's right, under section 161 of the Revised Statutes, to prescribe regulations for the government of his department, the distribution and performance of its business, and the custody, use, and preservation of its property-----

220

**PUBLIC INTEREST**

29. The Government will acquire shop rights in an invention not subject to Order No. 1763 upon a certification that it is liable to be used in the public interest, if the inventor obtains a patent under the act of March 3, 1883, as amended (35 U. S. C. sec. 45)-----

12

30. A certificate of public interest under the act of March 3, 1883, as amended (35 U. S. C. sec. 45), is proper with respect to an Electric Pencil Machine which may be used by Government draftsmen-----

98

31. A Hydraulic Compressor, the use of which may lower Government construction costs, may properly be certified as liable to be used in the public interest under the act of March 3, 1883, as amended (35 U. S. C. sec. 45)-----

126

**PUBLIC INTEREST; CERTIFYING DEPARTMENT**

32. The Navy Department is the proper Department to certify as being of public interest under the act of March 3, 1883, as amended (35 U. S. C. sec. 45), an invention made by a member of the Navy-----

127

**PUBLIC USE**

33. The use of an invention made by an employee of the Bureau of Reclamation, without restriction, by others in his office constitutes a public use of the invention-----

29

**INVENTIONS—Con.****Federal Employees—Con.**

34. The public use of an invention for more than 2 years without filing a patent application thereon is a bar to the issuance of a valid patent thereon under section 4886, Revised Statutes, as amended by the act of August 5, 1939 (53 Stat. 1212; 35 U. S. C. sec. 31) -

35. An invention upon which the issuance of a patent is barred by public use for more than 2 years may be freely used by the Government or any other person-----

**INVESTIGATIONS**

See Bureau of Reclamation, subheading Impounding of Waters.

**INVITEE**

See Federal Tort Claims.

**IRRIGATION**

See Indians and Indian Lands, subheading Flathead Irrigation Project, subheading Salt River Irrigation Project; Reclamation.

**ISOLATED TRACTS**

See Public Sale; Taylor Grazing Act and Lands, subheading Grazing Leases, Section 15.

**JURISDICTION**

See Indians and Indian Lands, subheading Flathead Tribe, subheading Osage Headrights; Taylor Grazing Act and Lands, subheading Acreage Limitation; Tide and Submerged Lands.

**KATMAI NATIONAL MONUMENT**

See Tide and Submerged Lands, subheading Administration of Territorial Tide-lands Adjoining National Monument.

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**LEASES**

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See Federal Employees, subheading Application for Oil and Gas Lease; Indians and Indian Lands; Mineral Leasing Act; Oil and Gas Leases, Indian Lands; Oregon and California Railroad Grant Lands; Public Lands, subheading Leasing by Government Officers; Reclamation Withdrawal, subheading School Lands, Arizona; Taylor Grazing Act and Lands; Withdrawal of Public Lands.

**LEASING ACT**

See Mineral Leasing Act.

**LEGISLATION**

See Homestead, subheading Reinstatement; Indians and Indian Lands, subheading Allotment, Rights-of-Way for Ditches or Canals, subheading Flathead Irrigation Project, subheading Salt River Irrigation Project; Secretary of the Interior, Authority, subheading Delegation; Taylor Grazing Act and Lands, subheading Acreage Limitation; Withdrawal of Public Lands.

**LICENSES**

See Indians and Indian Lands, subheading Columbia River Reservoir; Oregon and California Railroad Grant Lands; Taylor Grazing Act and Lands, subheading Grazing Fees.

**LIENS**

See Indians and Indian Lands, subheading Flathead Irrigation Project.

**LIEU SELECTIONS**

See Reclamation Withdrawal, subheading School Lands, Arizona.

**LIFE ESTATES**

See, also, Public Sale, subheading Preference Right of Adjoining Owner.

29

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**LIFE ESTATES—Con.**

Power of Life Tenant to Create a Cemetery and Erect a Monument on Historic Site

Mrs. Roosevelt and her children as joint life tenants are the exclusive owners of the property of the "Home of Franklin D. Roosevelt National Historic Site," at Hyde Park, New York, and may create a cemetery and erect a monument with the consent of the Secretary of the Interior for the United States, as provided in the first covenant of the deed. The cemetery and monument are also authorized by the Historic Sites Act of August 21, 1935 (49 Stat. 666)-----

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**LIMESTONE**

See Mining Claim, subheading Discovery.

**LOCATION**

See Mineral Lands, subheading Valentine Scrip Location; Mineral Leasing Act, subheading Oil and Gas Leases, Placer Mining Claim; Mining Claim; Public Lands, subheading Scrip Location; Scrip; Survey; Taylor Grazing Act and Lands, subheading Classification of Land; Withdrawal of Public Lands, subheading Temporary Withdrawal.

**LOUISIANA, STATE OF**

See Mineral Leasing Act, subheading Oil and Gas Leases, Acquired Lands.

**MARRIAGE**

See Indians, subheading Restricted Property.

**MIGRATORY BIRDS**

See Fish and Wildlife Service.

**MILITARY FURLOUGH**

See Inventions, subheading Federal Employees.

**MILITARY RESERVATIONS**

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See Public Sale, subheading Abandoned Military Reservation.

**MILITARY SERVICE**

See Homestead.

**MILL SITE**

See Mining Claim, subheading Common Improvements.

**MINERAL LANDS**

See, also, Indians and Indian Lands, subheading Allotment, Sale, subheading Executive Order Reservations, subheading Osage Headrights, subheading Uintah and Ouray Reservation, Utah; Oil and Gas Leases, Indian Lands; Mineral Leasing Act, subheading Oil and Gas Leases; Mining Claim; Withdrawal of Public Lands.

**Valentine Scrip Location**

**WAIVER; AGRICULTURAL SURFACE ENTRY ACT**

It is unnecessary to decide whether Valentine scrip may be located upon mineral land upon the filing of a mineral waiver under the agricultural surface entry act of July 17, 1914 (38 Stat. 509), when other reasons exist for not classifying the land sought as suitable for scrip location-----

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**MINERAL LEASING ACT**

**Aliens**

1. It is the general policy of the laws relating to the disposition of public lands and interests therein that aliens shall not be favored with participation in the bounty thus to be obtained from the United States-----

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**Coal Leases**

2. Departmental rule (43 CFR 193.3), precluding granting of coal leases absent a showing that an additional coal mine is needed and that

n

**MINERAL LEASING ACT—Con.****Coal Leases—Con.**

there is an actual need for coal which cannot otherwise be reasonably met, reexamined and held appropriate in view of the economics of the coal industry and the position of the Government as a present and potential royalty holder-----

**Coal Prospecting Permits****AUTOMATIC EXPIRATION OF PERMIT**

3. Automatic expiration of a permit, as distinguished from cancellation by affirmative action of the Commissioner of the General Land Office, is provided for only at the end of 4 years from date of issue of the permit-----

**CANCELLATION OF PERMIT; RIGHTS OF OTHER PERSONS**

4. Coal prospecting permits are not automatically canceled by expiration of the 2-year period for which they are issued, and until an outstanding permit is canceled and a notation of the cancellation made in the local office no other person is permitted to gain any right to the same class of deposits by the filing of an application-----

**COAL CHARACTER OF LAND; COLLATERAL PROCEEDINGS**

5. While prior to the issuance of a permit any person who has an interest is allowed to submit evidence against the issuance of the permit, the permit must not, after its issuance, be placed in jeopardy in a collateral proceeding instituted by a third person claiming that no permit should have been issued in the case because no prospecting was necessary to establish the coal character of the land-----

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**MINERAL LEASING ACT—Con.**

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**Mineral Classification**

6. The Director of the Geological Survey is the official expert, expressly entrusted by Congress with the "classification of the public lands and examination of the geological structure, mineral resources, and products of the national domain"-----

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**Oil and Gas Leases**

See, also, Federal Employees, subheading Application for Oil and Gas Lease; Mineral Lands; Mining Claim; Oil and Gas Leases, Indian Lands; Practice and Rules of Practice; Withdrawal of Public Lands, subheading Mining Locations.

**ACQUIRED LANDS; MINERAL RESERVATIONS UNDER LOUISIANA LAW**

7. In view of assurances from the Department of Agriculture that that Department interpreted the Louisiana law of servitude as being inapplicable to mineral reservations made by vendors of land to the United States, and that the Department contracted for the purchase of land on the basis that the vendors could reserve the minerals for over 10 years and assured such vendors that such reservations would be honored for the full period, this Department will give recognition to the mineral reservations for their full period-----

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8. Under Louisiana law the reservation by a vendor of mineral rights in lands sold creates only a servitude in the land which is extinguished if not exercised by the vendor within 10 years, even though the reservation is expressly made for periods in excess of 10 years-----

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## MINERAL LEASING ACT—Con.

## Oil and Gas Leases—Con.

## ACREAGE CHARGES

9. Even prior to discovery, a holder of operating agreements with lessees of noncompetitive oil and gas leases is chargeable with the acreage subject to the agreements and, under section 27 of the Mineral Leasing Act (act of February 25, 1920, 41 Stat. 437, 448, as amended; 30 U. S. C. sec. 184), may not hold at one time agreements with lessees covering in the aggregate more than 7,680 acres in any one State, or 2,560 acres within the geologic structure of the same producing oil or gas field. The rule as to a holder of operating agreements with permittees (52 L. D. 359) *distinguished* -----

10. The Department is prohibited, by section 27 of the Mineral Leasing Act, as amended, from promulgating a regulation permitting unlimited acreage holdings prior to discovery by an operator who has operating agreements with lessees of noncompetitive oil and gas leases -----

11. In computing the acreage to be charged against the holder of operating rights limited to deep sands underlying an oil and gas lease, the Department will not consider the sands, horizons, or the depth or cubic content of the interest embraced but will look only to the areal extent of such deep sands -----

## AIRPORT LEASE

12. Since the Airport Lease Act of May 24, 1928 (45 Stat. 728; 49 U. S. C. secs. 211-214, as amended by the act of August 16, 1941, 55 Stat. 621; 49 U. S. C. sec. 211), grants only the right to the use of the sur-

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## MINERAL LEASING ACT—Con.

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## Oil and Gas Leases—Con.

face for airport purposes, the Secretary may issue an oil and gas lease on lands covered by a previous airport lease. But the oil and gas lease must be so conditioned as not to impair the use of the surface for airport purposes under the airport lease -----

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## ALASKA OIL PROVISIO

13. See subheading Waiver of Rental.

## APPEALS

See, also, subheading Reinstatement.

14. A junior applicant for an oil and gas lease is not entitled to notice and hearing with respect to departmental proceedings which adjudicate the rights of a prior applicant, since he gains no rights by reason of his application unless and until the prior application is finally rejected -----

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## APPLICATIONS

See, also, subheadings Appeals; Assignment; Holding by Undisclosed Trust; Known Geologic Structure; Placer Mining Claim; Preference-Right Leases; Reinstatement.

15. Applications for noncompetitive oil and gas leases under the Mineral Leasing Act, which were rejected for failure to comply with new requirements in regulations published in the Federal Register on the day the applications were filed, were entitled to reinstatement as of the date of filing where the applicants were unable reasonably to acquire actual notice of the new regulations and presumably would have complied with the new requirements, and the practice in other

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## MINERAL LEASING ACT—Con.

## Oil and Gas Leases—Con.

land offices was merely to suspend defective applications pending compliance-----

16. An application for an oil and gas lease which states that the applicant has no interests, direct or indirect, in other leases or lease applications in the State should not be rejected for falsity merely because it may appear that the applicant may intend, by assignment or operating agreement, to turn the lease over to some operator or other person for development-----

17. Noncompetitive oil and gas leases may properly be issued on lands within wildlife refuges, if those lands are within unit areas covered by a unit agreement and both the unit agreement and the lease protect the refuge by prohibiting oil and gas prospecting or drilling on the refuge lands except with the consent of the Secretary of the Interior. No waiver, suspension, or reduction of rentals would be granted with respect to such refuge lands on any application for such relief based on inability to prospect or drill on such lands. But noncompetitive leases will not be issued on lands necessary for the sanctuary of wildlife if such lands are not within the unit area-----

18. Since an outstanding uncanceled oil and gas lease is not absolutely void, an oil and gas lease application for lands covered by such lease is invalid and will not be received until the availability of the lands for further application has been noted on the local land-office records-----

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## MINERAL LEASING ACT—Con.

## Oil and Gas Leases—Con.

## ASSIGNMENT

See, also, subheadings Applications; Cancellation; Preference-Right Leases.

19. The assignment of an oil and gas lease as to part of the land included in the lease creates a separate and independent lease as to that portion of land, and a discovery on either the retained or assigned portion does not inure to the benefit of the other portion-----

20. An instrument which simply recites that the lease owner "bargains, sells, transfers, assigns and conveys all of his right, title and interest in and to said lease" is an assignment and not a sublease; and the lease owner, after approval of the assignment, cannot be heard to say that by a separate agreement, not submitted to the Department, it was intended by the parties that the instrument was to be a sublease-----

21. A protest against a subsequent assignment of the oil and gas lease is moot where that assignee has withdrawn its application for approval of the assignment; and the dispute in this case concerning that assignment, resting on the terms of a private agreement, could and should more appropriately be settled either between the parties or by suit in the courts, rather than by this Department-----

22. Neither the Mineral Leasing Act nor the regulations pertaining thereto make provision for the assignment of a mere right to receive a lease-----

## BONDS

23. The successful bidder for an oil and gas lease is not to be

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**MINERAL LEASING ACT—Con.**

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**Oil and Gas Leases—Con.**

relieved of the requirement to submit a \$5,000 corporate surety bond because of his contention that he does not now contemplate any drilling, for he was awarded the lease only upon that condition, and he expressly agreed to submit such a bond-----

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24. The successful bidder for an oil and gas lease is not to be relieved of the requirement to submit a corporate surety bond, for he could be required to drill so as to protect the land from drainage, or in lieu thereof to pay compensatory royalties (section 2 (c) of the lease; 43 CFR 192.28; section 17 of the amendatory Mineral Leasing Act of August 21, 1935, 49 Stat. 674, 678; 30 U. S. C. sec. 226), and in that case the bond would be necessary-----

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25. The successful bidder for an oil and gas lease should not be relieved of the requirement to submit a corporate surety bond because of his contention that there is no possibility of drainage, for it is impossible to predict accurately whether or not there will be drainage, and it is departmental policy not to offer lands for lease at public auction unless the lands are drained or threatened with drainage-----

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**CANCELLATION**

See, also, subheadings Interior Department Employees; Noncompetitive Lease.

26. Where an employee of the Department obtained an oil and gas lease and, upon order to show cause why it should not therefore be canceled, he and his assignees procured the Department's approval to his assignment of the lease by con-

**MINERAL LEASING ACT—Con.**

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**Oil and Gas Leases—Con.**

cealing and misrepresenting material facts with respect to his interests in the lease, the approval is subject to revocation, and the lease is subject to cancellation. Under such circumstances, it is unnecessary to consider whether the approval of the assignment was warranted in the first place. The cancellation will be effected in accordance with section 31 of the Mineral Leasing Act, as amended (act of August 8, 1946, sec. 9, 60 Stat. 950, 956)-----

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**DISCOVERY**

27. See subheadings Acreage Charges; Assignment; Unitization; Sodium Prospecting Permits.

**DRILLING**

28. See subheadings Applications; Bonds; Extensions.

**EXTENSIONS**

29. The departmental practice relative to the extension of noncompetitive leases by unitization was in effect ratified by Congress in enacting the act of August 8, 1946 (60 Stat. 950)-----

383

30. In view of the standard provision contained in unit agreements for the consolidation of drilling and producing requirements, it has been the consistent practice of the Department to treat as extended by production in the unit area all unitized noncompetitive leases regardless of whether or not the leases may be considered situated on the known geologic structure of a producing field-----

383

31. Oil and gas leases issued under section 17 are entitled to the extension granted by that

**MINERAL LEASING ACT—Con.****Oil and Gas Leases—Con.**

section upon the payment of compensatory royalties only if such payment is made during the initial 5-year term of the lease, i. e., the "primary term"-----

32. Extensions granted to a lease by the act of December 22, 1943 (57 Stat. 608), and subsequent acts, do not constitute part of the primary term of the lease within the meaning of the provision for lease extension by the payment of compensatory royalties.-----

33. The oil and gas lease extensions granted by the acts of September 27, 1944 (58 Stat. 755), and November 30, 1945 (59 Stat. 587), do not constitute a part of the primary term of the lease within the meaning of the provision in section 17 of the Mineral Leasing Act, as amended (60 Stat. 950), which grants a 2-year extension for leases which are within the known geologic structure of a producing field at the end of their primary term and upon which drilling operations are being prosecuted on such expiration date.-----

**HOLDING BY UNDISCLOSED TRUST**

34. The Department cannot condone the obtaining of an oil and gas lease by a party in trust for others without a full prior disclosure of all parties having a beneficial interest in the lease and a showing of their qualifications to hold such interests. However, where the existence of the trust has been collaterally revealed to the Department in other proceedings and no fraudulent intent to violate the law appears to have existed, the parties were

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**MINERAL LEASING ACT—Con.**

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**Oil and Gas Leases—Con.**

qualified, and the lease has expired, the Department will not deny a preference-right application by the parties for a new lease based upon the expired lease.-----

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**INTERIOR DEPARTMENT EMPLOYEES**

35. No officer or employee of the Department of the Interior may be admitted to any share or part in, or derive any benefit from, an oil and gas lease of public lands issued by the Department. As a matter of public policy, the Department will generally not dispose of any interests in any public lands to its employees. Any such lease obtained by an employee of the Department is subject to cancellation.-----

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**KNOWN GEOLOGIC STRUCTURE**

See, also, subheadings Acreage Charges; Extensions.

36. Under regulations of the Department (43 CFR 192.3) the Geological Survey performs the Secretary's function of determining the boundaries of the structure of an oil or gas field within the meaning of section 32 of the Mineral Leasing Act (30 U. S. C. sec. 189), and an inadvertent listing of land for noncompetitive lease by the Commissioner or any employee of the Land Office is ineffectual to modify the Survey's determination. Redefinitions by the Survey are prepared formally and copies, together with new maps or diagrams, forwarded to the Commissioner for distribution to proper local land offices.-----

65

37. The fact that the land at the time of application is within the known producing structure of an oil and gas field, and

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Oil and Gas Leases—Con.

not the fact whether notice of designation has been given thereof by the filing of maps and diagrams in the local office, as prescribed by the oil and gas regulations (43 CFR 192.3), determines the allow-ability of the application----

65

NONCOMPETITIVE LEASE;  
DRAWINGS

38. No rights are initiated or conferred upon a successful applicant for the land at a drawing for a noncompetitive lease where the offering was without authority. Notice to such applicant of the subsequent offer of the land to competitive bidding is not therefore necessary-----

65

39. Section 17 of the Mineral Leasing Act, as amended (30 U. S. C. sec. 226), authorizes the Secretary, in his discretion, to lease lands known or believed to contain oil or gas only by competitive bid; hence a notification to an applicant that he has been successful in a drawing among applicants for known oil lands inadvertently listed for noncompetitive bid confers no right upon him, and he cannot be heard to complain that the "lease" which he does not have must be canceled by court action in accordance with the last sentence of section 17--

65

NOTICE OF AVAILABILITY OF  
LANDS FOR LEASE

40. Nothing in the Mineral Leasing Act of February 25, 1920, as amended (30 U. S. C. sec. 181 *et seq.*), or its numerous administrative and judicial interpretations, indicates that a notice posted by the Land Office concerning the availability of lands for oil or gas lease

MINERAL LEASING ACT—Con.

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constitutes an irrevocable offer of the lands or creates any rights in those who may respond -----

65

OPERATING AGREEMENTS

41. See subheadings Acreage Charges; Applications.

PLACER MINING CLAIM

42. Where a timely application for an oil and gas lease was filed under section 19 of the Mineral Leasing Act by a company which claimed to have a valid oil and gas placer location, and, as provided by the regulations then current, the application was accompanied by the tender of a deed quitclaiming the placer location to the United States, such tender constituted only conditional delivery of the deed, and rejection of the application included a rejection as well of the deed--

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PREFERENCE-RIGHT LEASES

See, also, subheading Holding by Undisclosed Trust.

43. A letter applying for a preference right to a new lease under the act of July 29, 1942 (56 Stat. 726; 30 U. S. C. sec. 226b), which was received by the register on January 3, 1944, but allegedly mailed and postmarked on December 29, 1943, held not to have been filed on time in a case in which the old lease expired on December 31, 1943. A paper is filed only at the time when actually delivered to and received by the office, not when it could have reached the office in the regular course of the mails. It is, therefore, immaterial whether or not there was unusual delay in the delivery of the letter. Under the statute, the holder of a lease was given a prefer-

## MINERAL LEASING ACT—Con.

## Oil and Gas Leases—Con.

ence right to a new lease "if he shall file an application therefor within ninety days prior to the date of the expiration of the lease"-----

44. Preference-right oil and gas leases under the act of July 29, 1942 (56 Stat. 726, as amended; 30 U. S. C. sec. 226b), are new leases and are subject to the discretion of the Secretary as to whether they should be issued at all. They may, therefore, be subject to stipulations not included in the previous oil and gas lease.-----

45. An application for a preference-right oil and gas lease under the act of July 29, 1942 (56 Stat. 726), will be rejected where subsequent to the filing of the application the land involved has been withdrawn from oil and gas leasing. The preference right conferred by the act of July 29, 1942, does not give the holder a vested right to the issuance of a lease but merely a preference over others to a lease if a lease is issued.-----

46. One who has a preference right to the issuance of an oil and gas lease does not have a leasehold interest or a right to receive a lease, but merely a right to have his timely application preferred over others in the event that the United States determines upon a further leasing of the same oil and gas lands at that time. Such a preference right is subject to be defeated by the occurrence of any event which might operate to make the lands unavailable for such further leasing or which might render the applicant incompetent to receive the lease.-----

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## MINERAL LEASING ACT—Con.

## Oil and Gas Leases—Con.

47. Where a preference-right oil and gas lease applicant, who was a citizen of the United States, died while his application was pending, leaving as heirs only nonresident aliens who assented to an assignment by the decedent's American executor of all their interests in the lease and application to a Delaware corporation, a request that the lease be issued to the estate of the decedent and that the assignment to the Delaware corporation be concurrently approved was properly rejected.-----

## PRIMARY TERM

See, also, subheading Extensions.

48. As used in section 17 of the Mineral Leasing Act, the "primary term" of an oil and gas lease means the initial 5-year term of the lease.-----

## REINSTATEMENT

See, also, subheading Applications.

49. An oil and gas application which, although validly filed, was twice rejected need not be reinstated where no appeals were filed, the case was twice "finally" closed, and there are no extraordinary circumstances or equities outweighing the need for drawing the line of finality in such cases.-----

## RENEWALS

50. The royalty scale used in oil and gas leases issued in renewal of 5 percent or "a" leases provides for a straight step-scale royalty and not a combination-step and sliding-scale royalty.-----

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<b>MINERAL LEASING ACT—Con.</b>	<b>Page</b>
<b>Oil and Gas Leases—Con.</b>	
<b>RENTALS</b>	
51. See subheadings Applications; Unitization; Waiver of Rental, Alaska Oil Proviso.	
<b>ROYALTIES</b>	
52. See subheadings Bonds; Extensions; Renewals; Unitization; Waiver of Rental, Alaska Oil Proviso.	
<b>STATUTORY CONSTRUCTION; SECTION 27</b>	
53. The purpose of section 27 of the Mineral Leasing Act (act of February 25, 1920, 41 Stat. 437, 448, as amended; 30 U. S. C. sec. 184) is to prevent monopolistic control over the oil and gas deposits in the public domain-----	4
<b>SUBLEASES</b>	
54. See subheading Assignment.	
<b>UNITIZATION; RENTALS AND ROYALTIES</b>	
See, also, subheadings Applications; Extensions.	
55. A "discovery" rental of \$1 per acre is chargeable on noncompetitive oil and gas leases committed to a unit agreement under which a discovery is made although no part of the leased lands lies within any participating area established for the unit-----	383
56. The concept of unitization as creating in effect a single lease for the purposes of operations and production does not require that the separate identity of unitized leases be disregarded for the purpose of crediting royalties on rentals--	383
<b>WAIVER OF RENTAL; ALASKA OIL PROVISIO</b>	
See, also, subheadings Applications; Rentals.	

<b>MINERAL LEASING ACT—Con.</b>	<b>Page</b>
<b>Oil and Gas Leases—Con.</b>	
57. To the extent that section 22 of the Mineral Leasing Act limited the discretion of the Secretary of the Interior to waive the rental on oil and gas leases in Alaska to the first 5 years of such leases, it has been superseded by section 39 of that act, which, among other things, authorizes the Secretary to waive rental or minimum royalty on oil and gas leases whenever in his judgment it is necessary to do so in order to promote development, or an oil and gas lease cannot be successfully operated under the terms provided therein-----	323
<b>Potassium Prospecting Permits</b>	
58. Issuance of a potassium prospecting permit is discretionary, and the filing of an application therefor confers no right on the applicant-----	289
59. An order withdrawing lands from all forms of appropriation under the public-land laws, including the mineral leasing laws, is effective against a prior application for a permit to prospect for potassium on such lands-----	289
60. The denial of an application for a potassium prospecting permit does not constitute deprivation of property without due process of law---	289
61. A withdrawal order which neither enhances nor diminishes existing rights does not deny equal protection of the laws to a prior applicant for a potassium prospecting permit-----	289
<b>Public Drawing</b>	
62. See subheading Oil and Gas Leases, Noncompetitive Lease; Sodium Prospecting Permits.	

**MINERAL LEASING ACT—Con.****Sodium Leases****PREFERENCE RIGHT; NECESSITY FOR FURTHER PROSPECTING**

63. No preference lease is to be issued if it appears that further prospecting will be necessary to determine the presence of sodium in workable quantity and quality in the land-----

397

**REINSTATEMENT OF APPLICATIONS**

64. A petition for reinstatement of a sodium-lease application will not be granted where the applicant is not entitled as a matter of law or equity to the issuance of a lease without competitive bidding and reinstatement of the application would therefore serve no useful purpose-----

365

**Sodium Prospecting Permits**

65. An application for a sodium permit must be rejected where the lands applied for are known to contain valuable deposits of sodium borates-----

204

66. Where, because of prior disposals, a reasonably compact area of contiguous land cannot be obtained, the inclusion of incontiguous tracts will be deemed in compliance with the requirement of section 23 of the Mineral Leasing Act of February 25, 1920, that the lands be "in reasonably compact form," provided the tracts are within an area of 6 miles square-----

287

67. The priority of simultaneously filed permit applications is to be determined by a public drawing-----

397

68. While section 24 of the Mineral Leasing Act of February 25, 1920, as amended (41 Stat. 437, 447; 30 U. S. C.

**MINERAL LEASING ACT—Con.**

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**Sodium Prospecting Permits—Con.**

sec. 262), grants to a permittee a preference right to a *lease*, upon a showing of a valuable discovery, there is no statute providing for preference rights in the issuance of sodium prospecting *permits*-----

397

**MINING CLAIM**

See, also, Mineral Leasing Act, subheading Oil and Gas Leases, Placer Mining Claim; Withdrawal of Public Lands, subheading Mining Locations.

**Apportionment**

1. A shaft which is counted as a common improvement cannot also be considered to be an individual improvement for the benefit of the claim upon which it is located-----

193

**Assessment Work**

2. See subheading Common Improvements, Community of Interest.

**Common Improvements****CABIN**

3. It is doubtful that a cabin for workmen may be considered a common improvement where no active mining operations have been conducted after erection of the cabin and there is nothing to show that it has been occupied by workmen working on the claims-----

193

**COMMUNITY OF INTEREST**

4. The existence of an understanding between two mining claimants that if either was to sell his claims the other would put in his claims too, and the fact that each would sometimes do assessment work for the other, are insufficient to show such a community of interest between the two in.

**MINING CLAIM—Con.****Common Improvements—Con.**

performing work on their claims that such work may be considered to be a common improvement for the benefit of both groups of claims-----

193

**CONTIGUITY OF CLAIMS**

5. Where a claim was located as being contiguous to a group of other claims and is shown by the official survey upon application for patent to be contiguous to such other claims, it will not be excluded from sharing in the benefit of common improvement work done for those claims merely because a mineral surveyor's map made in connection with another proceeding shows such claim to be noncontiguous----

192

**MILL SITE RELOCATION**

6. A mining claim which is located upon land previously located by the same claimant as a mill site is not entitled to share in common improvement work performed prior to location of the mining claim upon the theory that it is merely an amendment of and a continuation in substance of the earlier mill-site location-----

192

**PRIVITY OF INTEREST**

7. A mining claimant who has made locations upon ground previously located by another is not entitled to claim the benefits of common improvement work performed for the benefit of the earlier claims upon his mere assertion that the claims were turned over to him by the earlier locator. Such an assertion is insufficient to establish a privity of interest between himself and the earlier locator-----

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**MINING CLAIM—Con.**

Page

**Concurring Decisions of Subordinate Adjudicating Officials on Questions of Fact**

8. The concurring decisions of the register (now manager) of the local land office and the Commissioner of the General Land Office (now Director of the Bureau of Land Management) on questions of fact are generally not disturbed on appeal to the Secretary unless clearly wrong-----

446

**Contest****FAILURE TO SPECIFY CLAIM IN CHARGES**

9. Although a claim is not specified in a contest proceeding brought against several claims in a group of which it is a part, the Department is not justified in issuing a patent for such claim in the absence of evidence showing that the statutory amount of improvements has been made on the claim-----

193

**Contiguity of Claims**

10. See subheading Common Improvements.

**Discovery**

11. Showings of oil in shallow wells are insufficient to constitute a discovery where the possible oil-bearing formations lie at depth and are separated from the surface by non-oil-bearing strata-----

129

**AUTHORITY OF DEPARTMENT TO DETERMINE CLAIM INVALID**

12. This Department has full authority to determine that a claim is invalid for lack of discovery-----

446

**FINDINGS OF COMMISSIONER AND REGISTER**

13. The concurrent findings of the register and the Commis-

**MINING CLAIM—Con.****Discovery—Con.**

sioner of the General Land Office that a sufficient discovery of minerals has been made on a claim will not be disturbed unless clearly wrong-----

192

**Good Faith**

14. If a mining location is made in good faith for mining purposes and is supported by a sufficient discovery of mineral, an application for patent based thereon may not be rejected merely because the applicant may have been moved to make the application for the purpose of securing title to valuable timber on the claim--

192

**NEW EVIDENCE**

15. A decision holding placer mining claims to be null and void because of lack of discovery of valuable minerals and lack of diligent prosecution of work leading to discovery will not be disturbed where no new evidence is submitted to show that a discovery was made or that there was diligent prosecution of work leading to a discovery-----

129

**PREREQUISITE TO VALIDITY**

16. Since only "valuable mineral deposits" may be located under the mining laws of the United States, no mining claim is valid until there has been a discovery of minerals, within the limits of the claim, which would justify a person of ordinary prudence in the further expenditure of time and money with reasonable prospect of success in developing a profitable mine. Such discovery means more than the showing only of isolated bits of mineral or geologic infer-

**MINING CLAIM—Con.**

Page

**Discovery—Con.**

ences or mere indications or belief as to the existence of mineral -----

446

**VALUABLE MINERAL DEPOSITS**

17. Whether deposits of gypsum, clay, limestone, and other mineral substances of wide occurrence, are valuable mineral deposits subject to location under the mining laws is a question of fact and depends upon the marketability of the deposits-----

129

**Good Faith**

18. See subheading Discovery.

**Improvements**

19. See subheadings Apportionment; Common Improvements.

**Location****PATENTS**

20. Where a mining location is made upon land embraced in an outstanding oil and gas permit, patents issued for the land are not for this reason subject to cancellation upon the ground of fraud over 6 years after issuance of the patents-----

204

**Patents**

21. See subheading Common Improvements, Contiguity of Claims; subheading Contest; subheading Discovery, Good Faith; subheading Location.

**Relocation**

22. See subheading Common Improvements, Mill Site.

**MINNESOTA, STATE OF**

See Homestead, subheading Second Entry, Volstead Drainage Act.



**MINORS**

See Public Sale, subheading Preference Right of Adjoining Owner.

**MISSOURI, STATE OF**

See Public Lands, subheading Accretion, Riparian Ownership.

**MOUNTAINOUS TRACT**

See Public Sale.

**NATIONAL FORESTS**

See Public Sale, subheading Isolated-Tract Application; Reclamation Withdrawal, subheading Forest Reserve; School Lands, subheading New Mexico; Taylor Grazing Act and Lands, subheading Grazing Leases, Section 15, Preference Right.

**NATIONAL HISTORIC SITE**

See Life Estates.

**NATIONAL PARKS AND MONUMENTS**

See Federal Tort Claims, subheading Invitee; Life Estates; Tide and Submerged Lands.

**NATIONAL PARK SERVICE**

See Federal Tort Claims, subheading Independent Contractor, subheading Invitee; Indians and Indian Lands, subheading Columbia River Reservoir; Tide and Submerged Lands.

**NATIONALS OF FOREIGN GOVERNMENTS**

See United States, subheading Government-Sponsored Training Programs.

**NAVIGABLE WATERS**

See Indians and Indian Lands, subheading Columbia River Reservoir; Patents, subheading Interpretation in Ac-

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**NAVIGABLE WATERS—Con.**

cordance with Federal or State Law; Public Lands, subheading Accretion, Riparian Ownership; Tide and Submerged Lands.

**NAVY DEPARTMENT**

See Inventions, subheading Federal Employees, Public Interest, Certifying Department.

**NEGLIGENCE**

See Federal Tort Claims.

**NEW MEXICO, STATE OF**

See School Lands.

**NORTH DAKOTA, STATE OF**

See Patents, subheading Interpretation in Accordance with Federal or State Law; Public Lands, subheading Accretion, Riparian Ownership.

**NOTICE**

See Homestead, subheading Patent, Issuance of; Indians and Indian Lands, subheading Flathead Irrigation Project; Mineral Leasing Act, subheading Oil and Gas Leases; Oil and Gas Leases, Indian Lands; Practice and Rules of Practice.

**OATHS**

See United States, subheading Government-Sponsored Training Programs.

**OFFICERS**

See Federal Employees, subheading Deceased Officers or Employees; Indians and Indian Lands, subheading Leases and Permits; Mineral Leasing Act, subheading Oil and Gas Leases, Interior Department Employees; Public Lands.

**OIL AND GAS DIVISION °**

See President's Authority, subheading Delegation, Secretary of the Interior.

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**OIL AND GAS LANDS**

See Mineral Lands; Mineral Leasing Act; Mining Claim; Oil and Gas Leases, Indian Lands.

**OIL AND GAS LEASES, INDIAN LANDS**

See, also, Indians; Indians and Indian Lands; Indian Tribes.

**Unit Operation Agreement**

1. Under a provision for the continuance in full force and effect for so long as oil or gas can be produced in commercial quantities of an agreement by which the Denver Producing and Refining Company undertook to operate, as a unit, a block of oil leases on restricted Indian land, the agreement remains fully effective so long as an oil well drilled within the unit area produces oil in quantities sufficient for operation at a profit even though the operation as a whole, including expenditures for development and equipment, results in a loss...

429

2. To produce oil in commercial quantities it is not essential that the returns from the well repay the drilling costs...

429

3. An obligation to exercise due diligence in drilling additional wells is not met by an operator who has drilled but one well in a period of 10 years, and further drilling may be required upon written notice, as provided in the agreement of the parties...

429

**OKLAHOMA, STATE OF**

See Indians, subheading Restricted Property, Oklahoma Community Property Act; Indians and Indian Lands, subheading Osage Headrights.

Page	<b>OREGON AND CALIFORNIA RAILROAD AND RECONVEYED COOS BAY GRANT LANDS</b>	Page
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Leases and Special Land-Use Permits for Recreational Purposes; Authority of the Secretary to Issue

1. In the absence of specific statutory authority, Government officers have no power to lease public lands...

313

2. The act of August 28, 1937 (50 Stat. 874), does not authorize the Secretary to lease O. and C. lands for recreational purposes...

313

3. The provision of 43 CFR, Cum. Supp., 258.2 is valid, and, in the absence of congressional intent to the contrary, the issuance of special land-use permits is not restricted to cases in which there is no statute at all governing the type of use desired...

313

4. The act of April 13, 1928 (45 Stat. 429; 43 U. S. C. sec. 869a), while permitting the issuance of recreational leases on O. and C. lands to States, counties, or municipalities, does not authorize leases to individuals or business organizations...

313

5. The Secretary has authority under 43 CFR, Cum. Supp., Part 258, to issue revocable licenses for the use of O. and C. lands for recreational purposes, but only in cases in which the beneficiaries cannot qualify as lessees under the act of April 13, 1928, *supra*...

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Page	<b>PABLO AND NINEPIPE RESERVOIRS</b>
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See Indians and Indian Lands, subheading Flathead Tribe.

**PARDONS**

See Alaska.

**PATENTS**

See, also, Color of Title; Homestead; Indians and Indian Lands, subheading Allotment, subheading Uintah and Ouray Reservation, Utah; Inventions; Mining Claim; Public Lands, subheading Accretion; Railroad Grant Lands; Survey.

**Interpretation in Accordance With Federal or State Law**

The question as to whether a patent conveys land between a platted traverse line and the waters of a navigable stream, being a Federal question and governed by Federal law, is not required, by the decision of *Erie Railroad Co. v. Tompkins*, 304 U. S. 64, to be decided solely on the basis of State law. This case is, therefore, not governed solely by the North Dakota decision in *Oberly v. Carpenter*, 67 N. Dak. 495, 274 N. W. 509.

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**PAYMENTS**

See Federal Tort Claims, subheading Damage Covered by Insurance; Indians and Indian Lands, subheading Osage Headrights; Secretary of the Interior, Authority, subheading Delegation, Attorney Contracts with Indian Tribes.

**PERMITS**

See Indians and Indian Lands, subheading Leases and Permits; Mineral Leasing Act, subheading Coal Prospecting Permits, subheading Potassium Prospecting Permits, subheading Sodium Prospecting Permits; Mining Claim, subheading Location; Oregon and California Railroad Grant Lands, subheading Leases and Special Land-Use Permits for Recreational Purposes; Taylor Grazing Act and Lands; Tide and

**PERMITS—Con.**

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Submerged Lands; Withdrawal of Public Lands.

**PETROLEUM**

See President's Authority, subheading Delegation, Secretary of the Interior, Oil and Gas Division.

**PLACE GRANTS**

See Railroad Grant Lands.

**PLACER MINING CLAIM**

See Mineral Leasing Act, subheading Oil and Gas Leases; Mining Claim; Withdrawal of Public Lands.

**PLUMAS' NATIONAL FOREST**

See Public Sale, subheading Isolated-Tract Application.

**POCKET VETO**

See Puerto Rico.

**POTASSIUM**

See Mineral Leasing Act, subheading Potassium Prospecting Permits; Withdrawal of Public Lands.

**POWER**

See Applications, subheading Power-Site Withdrawal; Indians and Indian Lands, subheading Flathead Irrigation Project; Inventions; Secretary of the Interior, Authority, subheading Delegation of Functions, Marketing of Electric Power; Southwestern Power Administration.

**PRACTICE AND RULES OF PRACTICE**

See, also, Homestead, subheading Patent, Issuance of; Mineral Leasing Act, subheading Oil and Gas Leases, Applications, subheading Oil and Gas Leases, Extensions; Mining Claim, subheading Concurring Decisions of Subordinate Adjudicating Officials on Ques-

**PRACTICE AND RULES OF PRACTICE—Con.**

tions of Fact; Taylor Grazing Act and Lands, subheading Authority of Director of Grazing Service, subheading Grazing Leases, Section 15, Preference Applicants.

**Appeals**

A junior applicant for an oil and gas lease is not entitled to notice and hearing with respect to departmental proceedings which adjudicate the rights of a prior applicant, since he gains no rights by reason of his application unless and until the prior application is finally rejected.

235

**PREFERENCE RIGHT**

See Applications, subheading Restoration from Power-Site Withdrawal; Desert-Land Entry; Mineral Leasing Act, subheading Oil and Gas Leases, subheading Sodium Leases, subheading Sodium Prospecting Permits; Public Sale; Taylor Grazing Act and Lands, subheading Grazing Leases, Section 15; Withdrawal of Public Lands, subheading Mining Locations.

**PRESCRIPTION**

See Mineral Leasing Act, subheading Oil and Gas Leases, Acquired Lands.

**PRESIDENT'S AUTHORITY**

See, also, Alaska; Federal Employees, subheading Deceased Officers or Employees; Public Sale, subheading Isolated-Tract Application; Puerto Rico, subheading Pocket Veto; School Lands, subheading Indemnity Selections; Withdrawal of Public Lands, subheading Temporary Withdrawal.

**PRESIDENT'S AUTHORITY—Con.**

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Delegation; Secretary of the Interior; Oil and Gas Division

1. Although the President, by virtue of his office and constitutional powers, exercises general supervision over the departments and independent establishments which comprise the executive branch of the Government, he is not required to exercise his supervisory and coordinating responsibilities personally, but may delegate functions to the heads of the various departments or to other officials in the executive branch of the Government.

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2. The President properly delegated to the Secretary of the Interior the President's functions with respect to coordinating the activities of the several departments and other agencies of the Government as they relate to oil and gas matters, and the President's powers and functions in connection with the administration of the Connally "Hot Oil" Act.

552

3. The Secretary properly delegated to the Oil and Gas Division the task of assisting him in the discharge of the responsibilities vested in him by the President and by the Congress in the statute charging the Secretary with the duty of supervising the public business relating to petroleum conservation.

552

4. An organizational status created by statute is not essential to the valid existence of a division, bureau, or other agency, as such agencies may be created by the head of a department to perform, under his supervision, functions vested in him by law.

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**PRESIDENT'S AUTHORITY—**

Con.

Reprieves and Pardons, Authority of Governor of Alaska to Grant

5. The Governor of Alaska has power under the act of June 6, 1900 (31 Stat. 321; 48 U. S. C. secs. 61, 64), to grant reprieves for persons convicted of Territorial or Federal offenses, but his power is limited in either event to such time as the decision of the President is made known. The Governor of Alaska has no power to grant pardons -----

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**PRIMARY TERM**

See Mineral Leasing Act, subheading Oil and Gas Leases.

**PRIVATELY OWNED LANDS**

See Fish and Wildlife Service, subheading Migratory Bird Treaty Act; Homestead, subheading Suspension of Entry Pending Segregative Survey; Public Sale; Taylor Grazing Act and Lands, subheading Grazing Leases, Section 15.

**PROTEST**

See Homestead, subheading Patent, Issuance of; Mineral Leasing Act, subheading Oil and Gas Leases, Assignment.

**PUBLIC AUCTION**

See Mineral Leasing Act, subheading Oil and Gas Leases, Bonds.

**PUBLIC DRAWING**

See Mineral Leasing Act, subheading Oil and Gas Leases, Noncompetitive Lease; subheading Sodium Prospecting Permits.

**PUBLIC INTEREST**

See Inventions; Public Sale; Taylor Grazing Act and Lands, subheading Grazing Leases, Section 15, Applications.

**PUBLIC LANDS**

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See, also, Desert-Land Entry; Federal Employees, subheading Application for Oil and Gas Lease; Grazing and Grazing Lands; Homestead; Mineral Lands; Mineral Leasing Act; Mining Claim; Public Sale; Reclamation, subheading Irrigation; Reclamation Withdrawal; School Lands; Scrip; Taylor Grazing Act and Lands; Tide and Submerged Lands; Waters and Water Rights; Withdrawal of Public Lands.

**Accretion**

**RIPARIAN OWNERSHIP**

1. Under the law of North Dakota, where the State owns the land in the bed of a navigable river, the ownership of land in North Dakota, which has accreted from the bed to the banks of the river, becomes vested in the owner of the riparian lands -----

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**RIPARIAN OWNERSHIP; DIVISION OF ALLUVIUM**

2. The general rule for establishment of side lines to divide alluvium between adjoining riparian owners along a river is to give each proprietor such proportion of the new shore line as he had of the old shore line. This is appropriately accomplished by measuring the whole ancient line of the river affecting the area involved and computing the portion of that line owned by each riparian proprietor; then measuring the whole length of the new shore line and appropriating to each proprietor such portion of the new line as he had of the old line; and then drawing the side lines from the points at which the proprietors bounded on the old line to the

**PUBLIC LANDS—Con.****Accretion—Con.**

points of division thus determined on the new line. Such accretion side lines do not generally run cardinal to the survey lines. This rule is followed in North Dakota.....

**RIPARIAN OWNERSHIP; PATENT**

3. Where, prior to the entry and patent of a lot of public land abutting on a meander line, a substantial accretion had formed between the meander line of the lot and the actual shore line of the Missouri River, title to the added area did not pass under a patent for the surveyed upland....

**RIPARIAN OWNERSHIP; SURVEY**

4. Generally, a meander line along a bank or shore is not a line of boundary, the boundary line being the water line itself. There are, however, exceptions to this general rule. Thus, the meander line is held to be the true boundary line if the meander line was run where no lake or stream calling for it exists; or where it is established so far from the actual shore line as to indicate fraud or mistake; or if, at the time a homestead entry is made, a large body of land previously formed by accretion is existing between the meander line and the water of the stream. In such cases, the patent will be construed to convey only the lands within the meander line.....

**Aliens**

5. It is the general policy of the laws relating to the disposition of public lands and interests therein that aliens shall not be favored with participa-

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**PUBLIC LANDS—Con.**

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**Aliens—Con.**

tion in the bounty thus to be obtained from the United States..... 412

**Effect of State Decisions**

6. The United States cannot be deprived of its title to public lands by a decision of a State court, particularly where the United States is not a party to the suit in the State court... 416

**Leasing by Government Officers**

7. In the absence of specific statutory authority, Government officers have no power to lease public lands..... 313

**Scrip Location; Departmental Determination**

8. An applicant seeking to locate scrip upon certain land cannot be heard to complain that the Department erred in failing to determine whether the land was public land or not when the Department, for purposes of acting upon his application, assumed that the land was public land..... 176

**PUBLIC SALE****Abandoned Military Reservation**

1. The laws pertaining both to the sale of abandoned military reservation lands and to the public sale of isolated tracts authorize, but do not require, the Secretary of the Interior to dispose of any land... 521

**Isolated-Tract Application; Establishment of National Forest**

2. The previous filing of an application for purchase as an isolated tract did not create a "valid claim" so as to except the land from a proclamation establishing a national forest, nor did it affect the authority of the President to include the

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**PUBLIC SALE—Con.**

**Isolated-Tract Application; Establishment of National Forest—Con.**

land in the national forest; consequently, the promulgation of the proclamation precludes favorable action on the previously filed application----

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**Preference Right of Adjoining Owner**

3. A preference right at a public sale is properly accorded to the owner of a life estate on adjoining property who applies as guardian on behalf of his minor children who own the remainder in fee in the adjoining land -----

108

4. Ownership of a life estate in adjoining land is not sufficient to confer upon the life tenant a preference right in the purchase of land at a public sale-----

108

**Public Interest**

5. Sale of land held to be in the public interest where it is public land extending into a general area of privately owned land, but only if the purchaser also buys certain additional public lands in order to prevent the isolation of such lands by surrounding privately owned lands-----

525

**Use of Improper Application Form**

6. Although executed on form governing sales of isolated tracts, application held sufficient as an application for a mountainous tract under the particular facts of the case, in which the supporting affidavit emphasized the mountainous character of the land and in which the Land Office, in a previous decision, had characterized the application as an application for a mountainous

**PUBLIC SALE—Con.**

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**Use of Improper Application Form—Con.**

tract and had suggested its re-filing -----

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**PUERTO RICO**

**Pocket Veto, Extent of Authority of Governor; Organic Act**

Under section 34 of the Organic Act of March 2, 1917 (39 Stat. 951, 960; 48 U. S. C. sec. 825), the Governor of Puerto Rico has authority to return to the Legislature with his objections a bill, originally disapproved by him, which thereafter was amended and passed by a two-thirds vote. In the present case, the Governor may exercise the same power through the use of a pocket veto, since the Legislature meanwhile had adjourned at the end of a regular session---

50

**PURCHASE**

See Indians and Indian Lands, subheading Alienation, subheading Allotment, Sale; Mineral Leasing Act, subheading Oil and Gas Leases, Acquired Lands; Public Sale; Railroad Grant Lands.

**RAILROAD GRANT LANDS**

See, also, Color of Title, subheading Conflicting Claims; Taylor Grazing Act and Lands, subheading Grazing Leases, Section 15, Preference Right.

**Application to Purchase Undivided Moiety**

1. The owner of the vested moiety of the constructed railroad is eligible, under section 5 of the act of March 3, 1887 (24 Stat. 556, 557; 43 U. S. C. sec. 898), to purchase from the United States the re-vested forfeited moiety in the conflicting place grant. Where one applicant claims to own the con-

**RAILROAD GRANT LANDS—****Con.****Application to Purchase Undivided Moiety—Con.**

structed railroad's moiety through a record chain of conveyances and another applicant claims to own that moiety by adverse possession, the question of such ownership being then pending in the courts, neither person has established that he is the owner of the privately owned moiety and thus eligible to purchase the Government's moiety under section 5 of the 1887 act. In the circumstances of this case, it is unnecessary now to determine whether a person acquiring the title to the privately owned moiety by adverse possession is an eligible purchaser under section 5 of the 1887 act.-----

435

**Conflicting Place Grants; Interest Forfeited to United States**

2. Where place grants of two or more railroads under the same statute are in conflict, each company would receive an equal undivided moiety to the conflicting lands. Upon forfeiture of one railroad's grant, its undivided moiety reverted in the United States.---

435

**RECLAMATION**

See, also, Bureau of Reclamation; Desert-Land Entry, subheading Withdrawals; Reclamation Withdrawal; Secretary of the Interior, Authority, subheading Delegation of Functions.

**Irrigation****AUTHORITY OF THE SECRETARY**

1. The authority of the Secretary under the reclamation laws extends to the construction of all irrigation features or works which may be neces-

**RECLAMATION—Con.****Irrigation—Con.**

sary or advisable and practicable to provide irrigation facilities for the arid lands within a project area.-----

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**COVER CROPS**

2. Whenever it reasonably appears that, in the absence of a cover crop on public lands within an irrigation project, erosion will result, with attendant damage to canals, laterals, and farm ditches, the planting of such crops is authorized by the reclamation laws.-----

299

**FARM DISTRIBUTION SYSTEMS**

3. The authority conferred by the reclamation laws upon the Secretary is sufficiently broad to permit the roughing in of farm distribution systems on public lands as an incident of the construction of an irrigation project.-----

299

**LAND LEVELING**

4. Where the topography is such that a farm distribution system cannot effect the ready spreading of water by gravity, the leveling of such public lands within an irrigation project for prospective farm use is authorized by the reclamation laws.-----

299

**SOIL CONSERVATION; PREPARATORY WORK**

5. When it is determined that such operations as the leveling of land, construction of farm ditches, and establishment of cover crops on public lands within an irrigation district, are reasonably calculated to control and prevent erosion, authority is vested in the Secretary by the Soil and Moisture Conservation Act of 1935 and section 6 of Reorganization Plan No. IV to conduct such operations.-----

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RECLAMATION WITHDRAWAL	Page	RECLAMATION WITHDRAWAL	Page
Forest Reserve		AL—Con.	
1. Lands included in a forest reserve remain subject to a reclamation withdrawal although they are severed from the public domain and public entry on them is precluded.....	281	School Lands; Unsurveyed Lands Reserved for School Purposes—Con.	
School Lands; Arizona		of June 17, 1902 (32 Stat. 388; 43 U. S. C. sec. 416).....	281
2. Sections 16 and 36 lands reserved for school purposes to the State of Arizona remained subject to a reclamation withdrawal under section 3 of the act of June 17, 1902 (32 Stat. 388; 43 U. S. C. sec. 416), even after survey.....	280	RECREATIONAL LANDS	
3. The act of April 7, 1896 (29 Stat. 90), which granted authority to the Territory of Arizona to lease the lands reserved for school purposes, is not inconsistent with an interpretation of section 3 of the Reclamation Act of June 17, 1902 (32 Stat. 388; 43 U. S. C. sec. 416), permitting a reclamation withdrawal of surveyed lands reserved for school purposes.....	280	See Oregon and California Railroad Grant Lands; Scrip, subheading Valentine Scrip Location.	
4. The Arizona Enabling Act of June 20, 1910 (36 Stat. 557), making specific provision for lieu selections if school sections were otherwise reserved, confirms the interpretation of section 3 of the Reclamation Act of June 17, 1902 (32 Stat. 388; 43 U. S. C. sec. 416), that lands reserved for school purposes remained subject to a reclamation withdrawal even after survey.....	281	REGISTER	
School Lands; Unsurveyed Lands Reserved for School Purposes		See Homestead, subheading Patent, Issuance of; Mining Claim, subheading Concurring Decisions of Subordinate Adjudicating Officials on Questions of Fact, subheading Discovery, Findings of Commissioner and Register.	
5. It is admitted that unsurveyed lands reserved for school purposes to a future State remained subject to a reclamation withdrawal under the act		REINSTATEMENT	
		See Applications; Homestead; Mineral Leasing Act, subheading Oil and Gas Leases, subheading Sodium Leases.	
		RENEWALS	
		See Mineral Leasing Act, subheading Oil and Gas Leases; Taylor Grazing Act and Lands, subheading Grazing Leases, Section 15.	
		RENTALS	
		See Mineral Leasing Act, subheading Oil and Gas Leases.	
		REPRIEVES AND PARDONS	
		See Alaska.	
		RESERVOIRS	
		See Ditches, Canals, and Reservoirs.	
		RESIDENCE	
		See Homestead.	
		RESTORATIONS	
		See Applications; School Lands, subheading Indemnity Selections; Withdrawal of Public Lands, subheading Mining Locations.	

**RIGHTS-OF-WAY**

See Indians and Indian Lands, subheading Allotment; subheading Columbia River Reservoir.

**RIPARIAN LANDS**

See Homestead, subheading Suspension of Entry Pending Segregative Survey; Public Lands, subheading Accretion.

**ROYALTIES**

See Indians and Indian Lands, subheading Osage Headrights; Inventions, subheading Federal Employees, Government's Right to Use; Mineral Leasing Act, subheading Coal Leases, subheading Oil and Gas Leases.

**RULES OF PRACTICE**

See Practice and Rules of Practice.

**SALE OF LANDS**

See Homestead, subheading Second Entry, Volstead Drainage Act; Indians and Indian Lands, subheading Alienation, subheading Allotment; Mineral Leasing Act, subheading Oil and Gas Leases, Acquired Lands; Public Sale; Railroad Grant Lands; Secretary of the Interior, Authority, subheading Delegation, Sale of Trust or Restricted Indian Lands.

**SALES OF SUPPLIES**

See Federal Employees, subheading Alaska Road Commission.

**SAND, STONE, AND GRAVEL**

Disposal of Materials on Public Lands

The act of September 27, 1944 (58 Stat. 745; 50 U. S. C., App., sec. 1601), expired on December 31, 1946, when the President proclaimed the cessation of hostilities-----

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**SCHOOL LANDS**

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See, also, Reclamation Withdrawal.

**Arizona**

1. There was no granting act involving Arizona school lands until its admission to statehood on February 14, 1912 (37 Stat. 1728)-----

281

**Congressional Reservation**

2. A congressional reservation of lands for school purposes to a future State is not a grant of such lands, and title remains in the United States, subject to the full control and disposition of Congress, until the contemplated grant is effected-----

280

**Indemnity Selections**

3. The existence of rights under the provisions of section 2339, Revised Statutes, should be no bar to the perfection of a State school indemnity selection, the clear list issued thereupon being under section 2340, Revised Statutes (30 U. S. C. sec. 52), subject to vested and accrued water rights recognized under section 2339, Revised Statutes-----

15

**CLASSIFICATION UNDER SECTION 7, TAYLOR GRAZING ACT**

4. While section 2275 of the Revised Statutes, as amended February 28, 1891 (26 Stat. 796; 43 U. S. C. sec. 851), granted a right to the States to make indemnity selection for certain deficiencies in the school-land grants, a State is not entitled to particular land selected unless the Secretary "in his discretion" has previously classified the land under section 7 of the Taylor Grazing Act, as amended (48

**SCHOOL LANDS—Con.****Indemnity Selections—Con.**

Stat. 1272; 49 Stat. 1976; 43 U. S. C. sec. 315f), as proper for selection-----

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**EFFECT OF TAYLOR GRAZING ACT**

5. The new congressional conservation policy of 1934-36, regarding the use and disposal of the public domain and the effect of the Taylor Grazing Act upon indemnity selections, considered-----

317

**STATUTORY REQUIREMENTS; STATE COMPLIANCE AND EQUITABLE TITLE; AUTHORITY OF THE SECRETARY**

6. Where statutes controlling a State's selection of indemnity lands require that the selection be made from unappropriated, unreserved, non-mineral public lands under the direction and subject to the approval of the Secretary of the Interior, the State acquires no rights by the selection of lands which have already been reserved by the President for classification in accordance with their highest usefulness and which the Secretary subsequently to the State's application further reserves for classification and development as small tracts, thereby in effect denying the State's petition for restoration of the lands as suitable for indemnity selection-----

317

**TIMBERLAND; CLASSIFICATION AS PROPER FOR SELECTION**

7. It is reasonable not to classify, as proper for indemnity selection, lands which are very valuable timberland and which may also serve the purposes of watershed protection-----

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**New Mexico****SCHOOL SECTIONS; TITLE OF THE TERRITORY; TITLE OF THE STATE**

8. The fact that title to school sections, previously surveyed, vested in the Territory at the time of the granting act of 1898 (30 Stat. 484) does not have the result that title necessarily passed to the State by operation of law, since section 6 of the New Mexico Enabling Act of June 20, 1910 (36 Stat. 557, 562), delayed the vesting of the State's title until the lands are removed from the national forest; also in cases where the lands had been included in the forest after having been surveyed-----

402

**SCHOOL SECTIONS WITHIN NATIONAL FORESTS; TITLE OF THE STATE**

9. Title to school sections within national forests does not vest in the State of New Mexico until the lands are removed from the national forest (section 6 of the New Mexico Enabling Act of June 20, 1910, 36 Stat. 557, 562)-----

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**SCRIP**

See, also, Mineral Lands, subheading Valentine Scrip Location; Public Lands, subheading Scrip Location; Taylor Grazing Act and Lands; Withdrawal of Public Lands, subheading Temporary Withdrawal.

**Public Lands; Departmental Determination**

- 1. An applicant seeking to locate scrip upon certain land cannot be heard to complain that the Department erred in failing to determine whether the land was public land or not when the Department, for pur-

**SCRIP—Con.****Public Lands; Departmental Determination—Con.**

poses of acting upon his application, assumed that the land was public land-----

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**Temporary Withdrawal; Appropriation**

2. Executive Order No. 6910 constitutes an appropriation of public land within the meaning of the Valentine Scrip Act, even though considered only as a temporary withdrawal for purposes of classification, and therefore bars the location of scrip. Congress has indicated that such a withdrawal under the act of June 25, 1910 (36 Stat. 847), is an appropriation--

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**Valentine Scrip Location****CLASSIFICATION OF LAND**

3. Classification of land under section 7 of the Taylor Grazing Act as not suitable for Valentine scrip location is proper where the land is beach land used by the public as a recreational area and is located within the limits of an incorporated city-----

176

**EXECUTIVE ORDER NO. 6910**

4. Regardless of whether or not it constitutes an appropriation, Executive Order No. 6910 clearly and definitely excludes the lands withdrawn from location by Valentine scrip. The mere right to locate scrip upon such land is not saved by the clause in the order that it is "subject to existing valid rights"-----

176

**MINERAL WAIVER; AGRICULTURAL SURFACE ENTRY ACT**

5. It is unnecessary to decide whether Valentine scrip may be located upon mineral land upon the filing of a mineral waiver under the agricultural

**SCRIP—Con.**

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Valentine Scrip Location—Con. surface entry act of July 17, 1914 (38 Stat. 509), when other reasons exist for not classifying the land sought as suitable for scrip location-----

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**SECRETARY'S DISCRETION**

See Secretary of the Interior, Authority.

**SECRETARY OF THE INTERIOR, AUTHORITY**

See, also, Bureau of Reclamation; Federal Employees; Homestead; Inventions; Indians and Indian Lands; Life Estates; Mineral Leasing Act; Mining Claim; Oregon and California Railroad Grant Lands; President's Authority; Public Lands; Public Sale; Reclamation; School Lands; Southwestern Power Administration; Taylor Grazing Act and Lands; Tide and Submerged Lands.

**Delegation****ATTORNEY CONTRACTS WITH INDIAN TRIBES.**

1. Sections 2103-2106 of the Revised Statutes (25 U. S. C. secs. 81-84) provide, among other things, for dual action by the Secretary of the Interior and the Commissioner of Indian Affairs in connection with the approval of contracts between attorneys and Indian tribes and the approval of payments made thereunder. The express language of this legislation, as well as its legislative history, show that it was intended that these provisions be complied with literally, and for this reason the Secretary may not delegate to the Commissioner the functions mentioned which are committed to the Secretary. Similar func-

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tions, however, which are committed to the Secretary by section 16 of the act of June 18, 1934 (48 Stat. 984), are merely veto powers given the Secretary under legislation designed to enlarge the scope of tribal responsibility, and these powers may be delegated to the Commissioner or Assistant Commissioner by the Secretary if he so desires.-----

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**SALE OF TRUST OR RESTRICTED  
INDIAN LANDS**

2. The Secretary cannot properly delegate to the Commissioner of Indian Affairs the authority to waive the limitation imposed by Order No. 420, as modified by Order No. 498 (25 CFR 241.12a), upon the sale of trust or restricted Indian lands and to approve the sale of such lands in individual cases which do not fall within any of the categories specified in the modified order as being appropriate for such approval.-----

358

3. The Indian Delegation Act (act of August 8, 1946, 60 Stat. 939; 25 U. S. C. A., Supp., sec. 1a) contemplates that the Secretary of the Interior will issue in regulation form various rules and standards which are to govern the administration of Indian affairs; and he cannot properly delegate to the Commissioner of Indian Affairs authority to issue regulations or authority to depart from or ignore the regulations issued by the Secretary of the Interior.-----

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**VETO POWER OVER TRIBAL  
LEGISLATION**

4. When a tribal constitution or charter provides that

**SECRETARY OF THE INTERIOR,  
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**Delegation—Con.**

certain types of ordinances or resolutions shall be subject to review or approval by the Secretary of the Interior, the Secretary's function is delegable, and personal consideration and action by the Secretary is not required.-----

555

5. Under general principles governing the delegability of Secretarial powers, the function of reviewing or approving tribal legislation can be delegated to the Commissioner of Indian Affairs as well as to the Under Secretary and the Assistant Secretaries of the Interior.-----

556

6. The Indian Delegation Act authorizes the Secretary to delegate to the Commissioner of Indian Affairs the power to review or approve tribal legislation.-----

556

7. If the Secretary issues general regulations to guide the Commissioner of Indian Affairs in the exercise of the delegated authority, the Secretary has unfettered discretion in the matter of delegating to the Commissioner authority to act under the regulations in particular instances or situations which come within the scope of the regulations.-----

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**Delegation of Functions****MARKETING OF ELECTRIC  
POWER; BUREAU OF RECLAMATION;  
SOUTHWESTERN  
POWER ADMINISTRATION**

8. The functions under the reclamation laws, including the function of marketing electric power generated at reclamation projects, are vested in the Secretary of the Interior.-----

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**SECRETARY OF THE INTERIOR,  
AUTHORITY—Con.****Delegation of Functions—Con.**

9. Under section 161 of the Revised Statutes, the Secretary possesses broad discretionary authority to determine the extent to which his functions in connection with the marketing of electric power from reclamation projects shall be delegated and in selecting the officials or agencies of the Department to whom or to which the delegation shall be made-----

453

10. Under section 161 of the Revised Statutes, the head of a Department can, without specific congressional authorization, delegate to subordinate officials of the Department many functions which require the exercise of judgment or discretion-----

453

11. The discretionary authority of the Secretary to delegate the function of marketing electric power from reclamation projects is not affected by the act of May 26, 1926, defining the scope of the position of the Commissioner of Reclamation, or by the act of December 19, 1941, expressly authorizing the Secretary to delegate his powers and duties under the reclamation laws to specified officials of the Bureau of Reclamation-----

453

12. If the Congress should extend the provisions of the reclamation laws to the State of Arkansas, and the Department should subsequently construct in Arkansas multiple-purpose projects under such laws, the Secretary of the Interior could properly assign to the Southwestern Power Administration the function of marketing any surplus electric power from such projects-----

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**SEGREGATION**

Page

See Homestead, subheading Desert-Land and Enlarged Entries.

**SERVITUDE**

See Mineral Leasing Act, subheading Oil and Gas Leases, Acquired Lands.

**SETTLEMENT**

See, also, Desert-Land Entry; Homestead; Indians and Indian Lands, subheading Allotment, Rights-of-Way for Ditches or Canals, subheading Executive Order Reservations, subheading Flathead Tribe.

**Small Site**

Occupation and settlement on a lot prior to the filing of an application for a home and business site thereon under the act of June 1, 1938 (52 Stat. 609; 43 U. S. C. sec. 682a), create no right or equity in the applicant-----

44

**SODIUM**

See Mineral Leasing Act.

**SOIL AND MOISTURE CONSERVATION**

See Reclamation, subheading Irrigation.

**SOUTHWESTERN POWER ADMINISTRATION**

See, also, Secretary of the Interior; Authority, subheading Delegation of Functions, Marketing of Electric Power.

**Establishment; Appropriations  
Authorized by Law**

1. The establishment of Southwestern Power Administration by the Secretary of the Interior to perform functions under section 5 of the Flood Control Act of December 22, 1944 (58 Stat. 887, 890; 16 U. S. C. sec. 825s), was authorized by section 161, Revised Statutes (5 U. S. C. sec. 22)---

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**SOUTHWESTERN POWER ADMINISTRATION—Con.**

Establishment; Appropriations Authorized by Law—Con.

2. Appropriations to the Southwestern Power Administration are authorized by law.

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**SPRINGS**

See Waters and Water Rights.

**STATE COURTS**

See Courts.

**STATE LAWS**

See Indians, subheading Restricted Property; Indians and Indian Lands, subheading Osage Headrights; Patents, subheading Interpretation in Accordance with Federal or State Law; Waters and Water Rights.

**STATE SELECTION**

See School Lands, subheading Indemnity Selections; Waters and Water Rights.

**STATE TAXES**

See Taxes, Federal and State.

**STATES AND TERRITORIES**

See Name of State and Territory Concerned.

**STATUTE OF LIMITATIONS**

See Homestead, subheading Patent, Issuance of.

**STATUTORY CONSTRUCTION**

Act of April 5, 1872 (17 Stat. 649): Valentine Scrip

See Scrip.

Act of June 3, 1878 (20 Stat. 89, as Amended; 43 U. S. C. sec. 311): Timber and Stone Lands

See Withdrawal of Public Lands, subheading Mining Locations.

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Act of March 3, 1879, Sec. 1 (20 Stat. 394; 43 U. S. C. sec. 31): Director, Geological Survey

See Mineral Leasing Act, subheading Mineral Classification.

Act of March 3, 1883, as Amended (35 U. S. C. sec. 45): Patents; Public Interest  
See Inventions.

Act of March 3, 1887, Sec. 5 (24 Stat. 556, 557; 43 U. S. C. sec. 898): Railroad Grants  
See Railroad Grant Lands.

Act of August 30, 1890 (26 Stat. 391; 43 U. S. C. sec. 945): Rights-of-Way for Ditches or Canals; Patent Reservations  
See Indians and Indian Lands, subheading Allotment.

Act of March 3, 1891, Sec. 7 (26 Stat. 1098; 43 U. S. C. sec. 165): Homesteads; Patents  
See Homestead, subheading Patent, Issuance of.

Act of June 21, 1898 (30 Stat. 484): Territory of New Mexico; School Grant  
See School Lands.

Act of June 6, 1900 (31 Stat. 321; 48 U. S. C. secs. 61, 64): Governor of Alaska

See Alaska, subheading Repleves and Pardons.

Act of February 15, 1901 (31 Stat. 790; 43 U. S. C. sec. 959): Rights-of-Way for Electrical Plants, Etc.

See Indians and Indian Lands, subheading Allotment.

Act of June 17, 1902 (32 Stat. 388; 43 U. S. C. secs. 411, 416, 419): Reclamation Act

See Reclamation, subheading Irrigation; Reclamation Withdrawal.

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Act of April 23, 1904 (33 Stat. 302): Flathead Indian Reservation; Allotment of Lands

See Indians and Indian Lands, subheading Flathead Tribe, Hunting on Pablo and Ninepipe Reservoir Sites.

Act of March 28, 1908 (35 Stat. 52; 43 U. S. C. secs. 324, 326, 333): Desert-Land Entries

See Desert-Land Entry, subheading Withdrawals.

Act of May 20, 1908 (35 Stat. 170; 43 U. S. C. sec. 1023): Public Lands in Minnesota; State Drainage Laws

See Homestead, subheading Second Entry, Volstead Drainage Act.

Act of March 3, 1909 (35 Stat. 796): Reservation of Power and Reservoir Sites

See Indians and Indian Lands, subheading Flathead Tribe, Hunting on Pablo and Ninepipe Reservoir Sites.

Act of June 20, 1910, Sec. 6 (36 Stat. 557, 562): New Mexico Enabling Act

See School Lands, subheading New Mexico.

Act of June 20, 1910, Sec. 24 (36 Stat. 557, 572): Arizona Enabling Act

See Reclamation Withdrawal, subheading School Lands, Arizona; School Lands, subheading Indemnity Selections, Statutory Requirements.

Act of June 25, 1910 (36 Stat. 847, as Amended; 43 U. S. C. secs. 141-143): Withdrawals

See Withdrawal of Public Lands.

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Act of June 25, 1910 (36 Stat. 851, as Amended; 35 U. S. C. sec. 68): Patent Rights; Government Employees

See Inventions, subheading Federal Employees; Government's Right to Use.

Act of June 25, 1910 (36 Stat. 855, as Amended; 25 U. S. C. secs. 372, 373): Allotted Lands of Deceased Indians

See Indians and Indian Lands, subheading Allotment, Sale.

Act of March 4, 1911 (36 Stat. 1253; 43 U. S. C. sec. 961): Rights-of-Way for Electrical Poles and Lines

See Indians and Indian Lands, subheading Allotment.

Act of June 6, 1912 (37 Stat. 123; 43 U. S. C. secs. 164, 169), Amending Secs. 2291, 2297, R. S.: Three-Year Homestead Act

See Homestead, subheading Double Residence.

Act of July 17, 1914 (38 Stat. 509; 30 U. S. C. secs. 121-123): Surface Entries on Phosphate, Oil, Gas, Etc. Lands

See Mineral Lands.

Act of September 5, 1914 (38 Stat. 712; 43 U. S. C. sec. 182): Second Homestead Entry

See Homestead, subheading Second Entry, Residence Requirements.

Act of August 25, 1916 (39 Stat. 535; 16 U. S. C. sec. 3): National Parks and Monuments

See Tide and Submerged Lands, subheading Administration of Territorial Tidelands Adjoining National Monument.



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Act of March 2, 1917, Sec. 34  
(39 Stat. 951, 960; 48 U. S. C.  
sec. 825): Organic Act of  
Puerto Rico

See Puerto Rico, subheading  
Pocket Veto.

Act of July 3, 1918 (40 Stat.  
755; 16 U. S. C. sec. 704):  
Migratory Bird Treaty Act

See Fish and Wildlife Serv-  
ice.

Act of February 25, 1919 (40  
Stat. 1161; 43 U. S. C. sec.  
272a): Credit for Military  
Service, World War I Vet-  
erans

See Homestead, subheading  
Military Service.

Act of February 25, 1920 (41  
Stat. 437, as Amended; 30  
U. S. C. sec. 181 *et seq.*):  
Mineral Leasing Act

See Mineral Leasing Act.

Act of May 21, 1920 (41 Stat.  
613, as Amended; 31 U. S. C.  
sec. 686): Economy Act;  
Transfer of Funds Between  
Government Agencies

See Bureau of Reclamation,  
subheading Impounding of  
Waters.

Act of September 20, 1922 (42  
Stat. 857; 43 U. S. C. sec.  
1161): Suspended Entries

See Homestead, subheading  
Reinstatement; Equitable Ad-  
judication.

Act of May 10, 1926 (44 Stat.  
453, 464-466): Appropria-  
tion; Irrigation Systems on  
Flathead Indian Reservation,  
Montana

See Indians and Indian  
Lands, subheading Flathead  
Irrigation Project.

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Act of May 26, 1926 (44 Stat.  
657; 43 U. S. C. sec. 373a):  
Commissioner of Reclamation

See Secretary of the Interior,  
Authority, subheading Delega-  
tion of Functions, Marketing of  
Electric Power.

Act of February 7, 1927 (44  
Stat. 1057; 30 U. S. C. sec. 281  
*et seq.*): Potash Act

See Mineral Leasing Act,  
subheading Potassium Pros-  
pecting Permits.

Act of March 9, 1928 (45 Stat.  
251; 30 U. S. C. sec. 201a):  
Extension of Coal Prospect-  
ing Permits

See Mineral Leasing Act,  
subheading Coal Prospecting  
Permits.

Act of April 13, 1928 (45 Stat.  
429; 43 U. S. C. sec. 869a):  
Exchanges of Public Lands  
with States for Recreational  
Purposes

See Oregon and California  
Railroad Grant Lands.

Act of May 24, 1928 (45 Stat.  
728, as Amended; 49 U. S. C.  
secs. 211-214): Public Air-  
ports

See Mineral Leasing Act,  
subheading Oil and Gas Leases,  
Airport Lease.

Act of December 22, 1928 (45  
Stat. 1069; 43 U. S. C. secs.  
1068, 1068a): Color of Title;  
Patents

See Color of Title, subhead-  
ing Conflicting Claims.

Act of June 30, 1932 (47 Stat.  
474): Restricted Indian  
Lands

See Indians and Indian  
Lands, subheading Alienation.

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Act of July 1, 1932 (47 Stat. 564; 25 U. S. C. sec. 386a): Leavitt Act; Construction Costs		Act of August 27, 1935 (49 Stat. 909; 43 U. S. C. sec. 256b): Disabled World War I Veterans; Final Proof	
See Indians and Indian Lands, subheading Salt River Irrigation Project.		See Homestead, subheading Residence.	
Act of March 10, 1934, Sec. 2 (48 Stat. 401, as Amended; 16 U. S. C. sec. 662): Conservation of Wildlife		Act of August 28, 1937 (50 Stat. 874): Revested Oregon and California Railroad Grant Lands	
See Bureau of Reclamation, subheading Impounding of Waters.		See Oregon and California Railroad Grant Lands.	
Act of June 18, 1934 (48 Stat. 984; 25 U. S. C. sec. 461 <i>et seq.</i> ): Indian Reorganization Act		Act of May 11, 1938 (52 Stat. 347; 25 U. S. C. secs. 396a-f): Unallotted Lands; Lease for Mining Purposes	
See Indians and Indian Lands, subheading Uintah and Ouray Reservation, Utah; Secretary of the Interior, Authority, subheading Delegation, Attorney Contracts with Indian Tribes.		See Indians and Indian Lands, subheading Executive Order Reservations.	
Act of June 28, 1934 (48 Stat. 1269; 43 U. S. C. sec. 315 <i>et seq.</i> ), as Amended June 26, 1936 (49 Stat. 1976): Taylor Grazing Act		Act of June 1, 1938 (52 Stat. 609; 43 U. S. C. sec. 682a): Five-Acre-Tract Act	
See School Lands, subheading Indemnity Selections, Classification Under Section 7; Taylor Grazing Act and Lands.		See School Lands, subheading Indemnity Selections, Statutory Requirements; Settlement, subheading Small Site.	
Act of April 27, 1935 (49 Stat. 163; 16 U. S. C. sec. 590a-q): Soil and Moisture Conservation		Act of June 29, 1940, Sec. 1 (54 Stat. 703): Use of Reservoir Land for Hunting, Fishing, and Boating	
See Reclamation, subheading Irrigation.		See Indians and Indian Lands, subheading Columbia River Reservoir.	
Act of August 21, 1935 (49 Stat. 666): Preservation of Historic Sites, etc.		Act of July 8, 1940 (54 Stat. 743; 5 U. S. C. sec. 103a): Deceased Officers or Employees; Expenses of Preparing and Transporting Remains	
See Life Estates.		See Federal Employees.	
		Act of October 17, 1940 (54 Stat. 1178, 1187; 50 U. S. C., App., sec. 561): Soldiers' and Sailors' Civil Relief Act	
		See Homestead.	

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Act of December 19, 1941 (55 Stat. 842; 16 U. S. C. sec. 590z-11): Delegation of Powers and Duties; Bureau of Reclamation

See Secretary of the Interior, Authority, subheading Delegation of Functions, Marketing of Electric Power.

Act of July 29, 1942 (56 Stat. 726; 30 U. S. C. sec. 226b): Preference-Right Oil and Gas Leases

See Mineral Leasing Act.

Act of September 27, 1944 (58 Stat. 745; 50 U. S. C., App., sec. 1601): Disposal of Materials on Public Lands

See Sand, Stone, and Gravel.

Act of September 27, 1944, Sec. 4 (58 Stat. 748; 43 U. S. C. sec. 282): Veterans' Preference Rights

See Withdrawal of Public Lands, subheading Mining Locations.

Act of December 22, 1944, Sec. 5 (58 Stat. 887, 890; 16 U. S. C. sec. 825s): Flood Control Act; Disposal of Electric Power

See Southwestern Power Administration, subheading Establishment.

Act of June 11, 1946, Sec. 4 (60 Stat. 238; 5 U. S. C. sec. 1003): Administrative Procedure Act

See Fish and Wildlife Service.

Act of July 1, 1946, Sec. 7 (60 Stat. 348, 385): Strikes Against the Government

See Federal Employees, subheading Antistrike Affidavit.

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Act of August 2, 1946 (60 Stat. 843; 28 U. S. C., 1946 ed., sec. 921 *et seq.*): Federal Tort Claims Act. (This act was made a part of the revised Judicial Code on June 25, 1948 (62 Stat. 982; 28 U. S. C. sec. 2671 *et seq.*), and was amended on April 25, 1949 (63 Stat. 62; 28 U. S. C. sec. 2401).)

See Federal Tort Claims.

Act of August 8, 1946 (60 Stat. 939; 25 U. S. C. A., Supp., sec. 1a): Indian Delegation Act

See Secretary of the Interior, Authority, subheading Delegation.

Revised Statutes, Sec. 161 (5 U. S. C. sec. 22): Head of Department; Regulations

See Secretary of the Interior, Authority, subheading Delegation of Functions, Marketing of Electric Power.

Revised Statutes, Sec. 453 (43 U. S. C. sec. 2): Duties Concerning Public Lands

See Tide and Submerged Lands, subheading Administration of Territorial Tidelands Adjoining National Monument.

Revised Statutes, Secs. 2103-2106 (25 U. S. C. secs. 81-84): Contracts with Indians

See Secretary of the Interior, Authority, subheading Delegation, Attorney Contracts with Indian Tribes.

Revised Statutes, Sec. 2275, as Amended (43 U. S. C. sec. 851): Indemnity Selections  
See School Lands.

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Con.**

Revised Statutes, Sec. 2276, as Amended (43 U. S. C. sec. 852): Indemnity Selections

See School Lands, subheading Statutory Requirements.

Revised Statutes, Sec. 2290 (43 U. S. C. sec. 162): Homestead Application; Affidavit

See Homestead, subheading Double Residence.

Revised Statutes, Sec. 2291, as Amended (43 U. S. C. sec. 164): Homesteads; Requisites to Issuance of Patent

See Homestead, subheading Double Residence.

Revised Statutes, Sec. 2297, as Amended (43 U. S. C. sec. 169): Homesteads; Failure to Establish Residence; Reversion

See Homestead, subheading Double Residence.

Revised Statutes, Sec. 2339 (30 U. S. C. sec. 51): Vested and Accrued Water Rights

See Waters and Water Rights.

Revised Statutes, Sec. 2340 (30 U. S. C. sec. 52): Vested and Accrued Water Rights

See Waters and Water Rights.

Revised Statutes, Sec. 3678 (31 U. S. C. sec. 628): Application of Moneys Appropriated

See Federal Employees, subheading Alaska Road Commission.

Revised Statutes, Sec. 3679, as Amended (31 U. S. C. sec. 665): Voluntary Service Forbidden

See Indians and Indian Lands, subheading Leases and Permits, Tribal Leasing Clerk.

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Revised Statutes, Sec. 4886, as Amended (35 U. S. C. sec. 31): Inventions Patentable

See Inventions, subheading Federal Employees, Public Use.

**STRIKES AGAINST THE GOVERNMENT**

See Federal Employees, subheading Antistrike Affidavit.

**SUBMERGED LANDS**

See Tide and Submerged Lands.

**SUBROGEE**

See Federal Tort Claims, subheading Damage Covered by Insurance.

**SURVEY**

See, also, Bureau of Reclamation, subheading Impounding of Waters; Desert-Land Entry, subheading Withdrawals; Homestead; Mining Claim, subheading Common Improvements, Contiguity of Claims; Public Lands, subheading Accretion; Reclamation Withdrawal, subheading School Lands, Arizona; School Lands, subheading New Mexico.

Location of Corners and Lines by Official Survey; Hiatus Left by Separate Surveys

When the locations of corners and lines established by an official Government survey are identified, they are conclusive, and the corner of a Government subdivision is where the United States surveyors in fact established it, whether such location is right or wrong, so that in the instant case where R. 8 E. and R. 7 E. were established by independent surveys and the west line of R. 8 E. and the east line of

**SURVEY—Con.**

Location of Corners and Lines by Official Survey; Hiatus Left by Separate Surveys—  
Con.

R. 7 E. are not identical, R. 7½ E. was subsequently established, with the result that lands in R. 7½ E. were not granted under the patents to the lands in Rs. 7 and 8 E-----

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**TAXES, FEDERAL AND STATE**

See Indians, subheading Restricted Property; Indians and Indian Lands, subheading Alienation.

**TAYLOR GRAZING ACT AND LANDS**

See, also, Grazing and Grazing Lands; Public Sale, subheading Abandoned Military Reservation; School Lands, subheading Indemnity Selections, Effect of Taylor Grazing Act; Scrip; Withdrawal of Public Lands.

**Acreage Limitation; Section 1**

CONTEMPORANEOUS ADMINISTRATIVE CONSTRUCTION; LEGISLATIVE RATIFICATION

1. The repeated appropriation of a portion of the receipts from grazing fees collected for the use of all Federal range, with knowledge on the part of the Congress, through annual reports of the Secretary of the Interior, of the administrative construction consistently being placed on a statutory provision limiting the acreage of such range, is significant as a confirmation and ratification of that construction-----

19

**TIME OF DETERMINATION**

2. There may not at any particular point of time be more than 142 million acres of "vacant, unappropriated, and unreserved" lands in grazing districts-----

19

**TAYLOR GRAZING ACT AND LANDS—Con.**

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**Acreage Limitation; Section 1—Con.**

"VACANT, UNAPPROPRIATED, AND UNRESERVED LANDS"

3. The term "vacant, unappropriated, and unreserved lands from any part of the public domain of the United States," as employed in the acreage-limitation provision in section 1 of the Taylor Grazing Act, does not include "lands withdrawn or reserved for any other purpose," to which reference is made in the proviso, and the acreage of the latter category of lands, when included in grazing districts "with the approval of the head of the department having jurisdiction thereof," is not to be included in computing the aggregate acreage of "vacant, unappropriated, and unreserved lands" permissible for inclusion in grazing districts---

19

**Advisory Board; Section 18**

**BIAS OF MEMBER**

4. Section 18 of the Taylor Grazing Act (53 Stat. 1002; 43 U. S. C. sec. 3150-1) expressly provides for an advisory board of "local stockmen" (see, also, 43 CFR 501.12), and there is no showing in the case to substantiate the claim of bias or impropriety on the part of one of the members-----

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**Authority of Director of Grazing Service; Examiner Resigning Before Rendering a Decision**

5. Under the regulations in force in March 1946 (43 CFR 501.9 (i)), the examiner either had to make findings of fact and render a decision himself, or could submit a proposed decision to the Secre-

# **TAYLOR GRAZING ACT AND LANDS—Con.**

Authority of Director of Grazing Service; Examiner Resigning Before Rendering a Decision—Con.

tary upon whose approval it would become the decision of the Department; and if the examiner resigned before issuing a decision, the Director of the Grazing Service, who had no function in the appellate process involving grazing matters, had no right to issue a decision on the basis of the hearing before the examiner—

## **Classification of Land; Section 7**

See, also, School Lands, subheading Indemnity Selections; Withdrawal of Public Lands, subheading Mining Locations.

## **AUTHORITY OF THE SECRETARY**

6. The authority conferred by section 7 of the Taylor Grazing Act upon the Secretary to classify public land is discretionary, not mandatory, whether he undertakes classification upon his own initiative or upon application of an interested party—

## **VALENTINE SCRIP LOCATION**

7. Classification of land under section 7 of the Taylor Grazing Act as not suitable for Valentine scrip location is proper where the land is beach land used by the public as a recreational area and is located within the limits of an incorporated city—

## **Grazing Fees; Section 3**

See, also, subheading Acreage Limitation.

8. The Taylor Grazing Act authorizes the Secretary to fix fees for grazing licenses and grazing permits upon any basis determined by him to be reasonable in the light of the pur-

# **TAYLOR GRAZING ACT AND LANDS—Con.**

## **Grazing Fees; Section 3—Con.**

poses of the act, which are to stop injury to the public range by overgrazing and soil deterioration, to provide for their orderly use, improvement, and development, and to stabilize the livestock industry dependent upon the public range. The cost of administration of the act is a factor which may be considered in fixing fees, but it is not the controlling factor—

## **Grazing Leases; Section 15**

### **APPLICATIONS; CONFLICTS**

9. While it is the duty of the Secretary of the Interior to entertain conflicting applications for grazing leases and to dispose of them as equity and the public interest may require, the rules of the Department (43 CFR 160.21) contemplate that a substantial proportion of such controversies should be resolved by neighborly understanding among the competing stockmen—

### **ASSIGNMENT**

10. See subheading Renewal; subheading Subleasing or Assignment.

### **CANCELLATION; PREFERENCE APPLICANT**

11. Grazing leases awarded to a preference applicant on the basis of control of cornering or contiguous lands are subject to cancellation to the extent that the lessee loses control of the respective base lands—

### **CONTIGUOUS OR CORNERING LANDHOLDERS**

12. See subheading Cancellation; subheading Preference Applicants; subheading Preference Right.

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TAYLOR GRAZING ACT AND LANDS—Con.	Page	TAYLOR GRAZING ACT AND LANDS—Con.	Page
Grazing Leases; Section 15— Con.		Grazing Leases; Section 15— Con.	
ISOLATED OR DISCONNECTED TRACTS		as between such applicants is a matter to be determined by the Department in the light of other pertinent factors.-----	258
13. See subheading Prefer- ence Right.		PREFERENCE RIGHT	
LEASE FORMS; SECRETARY'S DISCRETION		See, also, subheading Re- newal.	
14. The transmittal of a lease form for signature by the ap- plicant does not, upon signa- ture of the lease form by the applicant, immediately operate to prevent the Secretary from exercising his discretion to give final approval or disap- proval to the issuance of the lease, irrespective of the pre- liminary negotiations.-----	258	17. The holder of a 10-year national forest permit on con- tiguous lands is a "lawful oc- cupant of contiguous lands" under section 15 of the Taylor Grazing Act and is accordingly entitled to a preference right to a section 15 grazing lease. Previous contrary decisions overruled.-----	258
PREFERENCE APPLICANTS; AD- JUSTMENT OF DISPUTES		18. Under section 15 of the Taylor Grazing Act, an appli- cant for a grazing lease is en- titled to a preference over other applicants only if he owns land contiguous to the land applied for or controls or occupies contiguous land in a non-public-land status, and if he needs the land applied for in order properly to carry on grazing operations, on his base land.-----	539
15. The Department favors the settlement of grazing dis- putes between applicants for grazing leases by mutual neigh- borly agreement for equitable and reasonable allocation of the grazing range in the light of proper grazing practices.-----	262	19. An applicant for a graz- ing lease under section 15 of the Taylor Grazing Act is not entitled to a preference under that section as a lessee of con- tiguous public land where such land is held by him under a section 15 grazing lease.-----	540
PREFERENCE APPLICANTS; PRI- ORITY		PREFERENCE RIGHT; CONTIG- UOUS LANDHOLDERS	
See, also, subheading Can- cellation.		20. Under section 15 of the Taylor Grazing Act, only <i>con- tiguous</i> landholders have pref- erence rights to secure grazing leases where the tracts to be leased are more than 760 acres in extent.-----	262
16. Except for the provision in section 15 of the Taylor Grazing Act that the prefer- ence right shall be only "to the extent necessary to permit proper use of such contiguous lands," there is no distinction in preference between appli- cants for more than 760 acres where each applicant has con- tiguous lands. Each such ap- plicant is on a par with the other, unaffected by the extent of contiguity, and the extent to which a lease will be granted			

# TAYLOR GRAZING ACT AND LANDS—Con.

## Grazing Leases; Section 15—Con.

### PREFERENCE RIGHT; CONTIGUOUS OR CORNERING LANDHOLDERS

21. *Contiguous* or *cornering* landholders have preference rights to secure grazing leases for isolated or disconnected tracts embracing 760 acres or less.....

262

22. The preference rights of contiguous and cornering landholders are on an equal plane, unaffected by the extent of contiguity.....

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23. As between preference applicants on equal preference levels, the extent to which a lease will be granted is a matter to be determined by the Department in the light of other pertinent facts.....

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### PREFERENCE RIGHT; EVEN-NUMBERED SECTIONS WITHIN LIMITS OF RAILROAD GRANTS; ISOLATED OR DISCONNECTED TRACTS

24. The even-numbered sections of public lands within the limits of railroad grants are "isolated or disconnected tracts" within the meaning of section 15 of the Taylor Grazing Act. The inclusion in section 15 of a preference for cornering landholders to secure grazing leases on isolated or disconnected tracts was intended to give the holders of even-numbered tracts the same opportunity to secure grazing leases as was accorded to the holders of the odd-numbered section lands.....

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### RENEWAL; CONTRACTUAL RIGHT

25. The holder of a section 15 grazing lease which contains

# TAYLOR GRAZING ACT AND LANDS—Con.

## Grazing Leases; Section 15—Con.

a provision giving him a preference right to a new lease is entitled to a renewal of his lease even as against a preference-right claimant to a lease on the land.....

244

### RENEWAL; IMPOSITION OF CONDITIONS

26. On the renewal of a grazing lease, the condition may be imposed that certain of the lands leased shall be subject to use by an adjoining stockman as a passageway for his stock.....

244

### RENEWAL; PREFERENCE RIGHT

27. The preference right to renewal contained in a grazing lease is one of the authorized "terms and conditions as the Secretary may prescribe" under section 15 of the Taylor Grazing Act and constitutes a contractual preference right superior to any preference right which a new applicant could assert.....

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28. Where a grazing lease provides that upon the termination thereof the lessee will be accorded a preference right to a new lease upon such terms and for such duration as may be fixed by the Department, upon the lessee's timely assertion of a right to renewal, in the event the lands are then to be leased for grazing purposes, a new lease will be issued to such lessee for such duration and upon such terms as may then be appropriate in the circumstances.....

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### RENEWAL; PREFERENCE RIGHT; ASSIGNMENT

29. The preference right to renewal contained in a grazing lease is one of the authorized



**TAYLOR GRAZING ACT AND LANDS—Con.**

**Grazing Leases; Section 15—Con.**

"terms and conditions as the Secretary may prescribe" under section 15 of the Taylor Grazing Act and constitutes a contractual preference right superior to any preference right which a new applicant could assert. The assignment of the lease containing such contractual preference right transfers that right, as well as the other benefits and obligations under the lease-----

263

**SUBLEASING OR ASSIGNMENT**

30. The leased grazing lands are for the primary use of the lessee's stock rather than someone else's stock. The leased lands are not to be used for engaging principally in a pasturing business other than the lessee's own livestock operations. Any pasturing of other people's stock, exceeding the incidental, must first have the approval of the Commissioner of the General Land Office, in the absence of which the area leased may be reduced to the extent that it is excessive for the number of the lessee's stock-----

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**Licenses**

31. See subheading **Grazing Fees.**

**Permits**

32. See subheading **Grazing Fees; subheading Grazing Leases, Section 15, Preference Right; subheading Scope of Examiner's Decision.**

**Scope of Examiner's Decision; Framing of Issues; Additional Grazing Privileges and Existing 10-Year Permit**

33. While, when appealing to an examiner, an applicant may

**TAYLOR GRAZING ACT AND LANDS—Con.**

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**Scope of Examiner's Decision; Framing of Issues; Additional Grazing Privileges and Existing 10-Year Permit—Con.**

not restrict the issues, fairness requires that if additional issues are considered the examiner so state, in accordance with 43 CFR 501.9 (g), so that, unless the issues are specifically widened, questions involving the impropriety of an existing 10-year permit may not form the basis of a decision concerning the grant of additional grazing privileges-----

528

**Seasonal Use of Range**

34. Questions as to the seasonal use of the range are matters peculiarly for consideration by the local officials-----

528

**Use of Grazing Lands Prior to Taylor Grazing Act**

35. See **Grazing and Grazing Lands.**

**TERRITORIES**

See **Name of Territory Concerned.**

**TIDE AND SUBMERGED LANDS**

**Administration of Territorial Tidelands Adjoining National Monument; Authority of the Secretary; Bureau of Land Management; National Park Service**

1. Territorial tidelands may be administered by the Secretary, without disposition or depletion, under the general grant of jurisdiction over public lands contained in section 453, Revised Statutes (43 U. S. C. sec. 2), in that the Secretary or the appropriate official of the Bureau of Land Management may issue a revocable permit for a clam-canning operation on tide-

## TIDE AND SUBMERGED LANDS—Con.

Administration of Territorial  
Tidelands Adjoining National  
Monument; Authority of the  
Secretary; Bureau of Land  
Management; National Park  
Service—Con.

lands adjoining the Katmai  
National Monument-----

2. In addition, littoral own-  
ers in Alaska have a right of  
access to navigable water,  
which right is appurtenant to  
the upland but may be sepa-  
rated from it. Hence, the Sec-  
retary or the appropriate offi-  
cial of the National Park  
Service may, pursuant to the  
act of August 25, 1916 (39 Stat.  
535; 16 U. S. C. sec. 3), grant  
a revocable permit for a por-  
tion of the Katmai National  
Monument lands, together with  
the right of access to navigable  
water over intermediate tide-  
lands, or may simply grant the  
said right of access-----

## TIMBERLANDS

See Mining Claim, subhead-  
ing Discovery, Good Faith;  
School Lands, subheading In-  
demnity Selections.

## TITLE

See Homestead; Indians and  
Indian Lands, subheading Co-  
lumbia River Reservoir, sub-  
heading Executive Order Res-  
ervations, subheading Osage  
Headrights; Mineral Leasing  
Act, subheading Oil and Gas  
Leases, Assignment; Mining  
Claim, subheading Discovery,  
Good Faith; Public Lands;  
Public Sale, subheading Pref-  
erence Right of Adjoining  
Owner; Railroad Grant Lands;  
School Lands, subheading Con-  
gressional Reservation, sub-  
heading Indemnity Selections,  
subheading New Mexico.

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## TORT CLAIMS

See Federal Tort Claims.

## TRANSPORTATION

See Federal Employees, sub-  
heading Deceased Officers or  
Employees.

## UNDER SECRETARY OF THE INTERIOR

See Secretary of the Inte-  
rior, Authority, subheading  
Delegation.

## UNGRADED EMPLOYEES

See Federal Employees, sub-  
heading Collective Bargaining.

## UNITED STATES

### Government-Sponsored Train- ing Programs

1. Nationals of foreign gov-  
ernments received for train-  
ing under programs sponsored  
by the Government of the  
United States are in no sense  
employees of that Government,  
and hence are not legally re-  
quired to execute oaths of office  
or other papers common to ap-  
pointment in the service of the  
United States-----

2. There is ample legal au-  
thority for placement within  
the Interior Department of  
trainee nationals of other gov-  
ernments certified to it by  
either the Department of State  
or the International Training  
Administration, Inc.-----

3. The United States Cul-  
tural-Cooperation Program  
and regulations of the Depart-  
ment of State reviewed. The  
nature and scope of operations  
of the International Training  
Administration, Inc., reviewed.

## UTAH, STATE OF

See Indians and Indian  
Lands, subheading Uintah and  
Ouray Reservation, Utah.

## VALENTINE SCRIP

See Mineral Lands; Public  
Lands; Scrip; Taylor Grazing

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**VALENTINE SCRIP—Con.**

Act and Lands, subheading  
Classification of Land; With-  
drawal of Public Lands.

**VESTED RIGHTS**

See Applications; Desert-  
Land Entry; Grazing and  
Grazing Lands; Indians, sub-  
heading Restricted Property;  
Indians and Indian Lands, sub-  
heading Columbia River Reser-  
voir; Mineral Leasing Act,  
subheading Coal Prospecting  
Permits, subheading Oil and  
Gas Leases, subheading Potas-  
sium Prospecting Permits;  
Practice and Rules of Practice;  
Public Lands, subheading Ac-  
cretion; School Lands, sub-  
heading Indemnity Selections;  
Scrip, subheading Valentine  
Scrip Location; Settlement;  
Waters and Water Rights;  
Withdrawal of Public Lands,  
subheading Mining Locations.

**VETERANS**

See Homestead, subheading  
Military Service; Withdrawal  
of Public Lands, subheading  
Mining Locations.

**VETO POWER**

See Puerto Rico, subheading  
Pocket Veto; Secretary of the  
Interior, Authority, subhead-  
ing Delegation.

**WAIVER**

See Federal Employees, sub-  
heading Antistrike Affidavit,  
subheading Removal; Mineral  
Lands, subheading Valentine  
Scrip Location; Mineral Leas-  
ing Act, subheading Oil and  
Gas Leases, Applications, sub-  
heading Waiver of Rental;  
Scrip; Secretary of the In-  
terior, Authority, subheading  
Delegation, Sale of Trust or  
Restricted Indian Lands.

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**WATERS AND WATER RIGHTS**

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See, also, Bureau of Recla-  
mation, subheading Archeo-  
logical Excavations, subhead-  
ing Impounding of Waters;  
Indians and Indian Lands, sub-  
heading Columbia River Reser-  
voir; School Lands, subheading  
Indemnity Selections.

**Revised Statutes, Sections 2339,  
2340**

1. Sections 2339, 2340, Re-  
vised Statutes (30 U. S. C. secs.  
51, 52), recognize the right of  
prior appropriation of water on  
the public domain even as  
against the United States and  
its grantees where the appro-  
priation is authorized by the  
State in which it is made-----

14

2. The rights to water recog-  
nized and safeguarded under  
section 2339, Revised Statutes,  
are distinct from the rights to  
the land itself-----

14

3. Under section 2340, Re-  
vised Statutes, subsequent dis-  
posal or withdrawal of lands  
containing waters the rights to  
which have vested or accrued is  
subject to an easement suffi-  
cient to permit the continued  
use of the waters-----

15

**School Land; Indemnity**

4. The existence of rights  
under the provisions of section  
2339, Revised Statutes, should  
be no bar to the perfection of  
a State school indemnity selec-  
tion, the clear list issued there-  
upon being under section 2340,  
Revised Statutes (30 U. S. C.  
sec. 52), subject to vested and  
accrued water rights recog-  
nized under section 2339, Re-  
vised Statutes-----

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**Withdrawals**

5. No purpose of the Execu-  
tive order of April 17, 1926,  
would be served by the with-  
drawal of a subdivision of

## WATERS AND WATER RIGHTS—Con.

### Withdrawals—Con.

public land containing a spring, although of the character contemplated by the withdrawal, if the right to use the waters is vested under State law in private parties.

## WILDLIFE

See Bureau of Reclamation, subheading Impounding of Waters; Fish and Wildlife Service, subheading Migratory Bird Treaty Act; Homestead, subheading Desert-Land and Enlarged Entries; Indians and Indian Lands, subheading Columbia River Reservoir; Mineral Leasing Act, subheading Oil and Gas Leases, Applications.

## WILLS

See Indians and Indian Lands, subheading Osage Headrights; Life Estates.

## WITHDRAWAL OF PUBLIC LANDS

See, also, Applications, subheading Power-Site Withdrawal; Desert-Land Entry; Homestead, subheading Desert-Land and Enlarged Entries, subheading Second Entry; Indians and Indian Lands, subheading Flathead Tribe; Mineral Leasing Act, subheading Oil and Gas Leases, Preference-Right Leases; Reclamation Withdrawal; Scrip; Taylor Grazing Act and Lands, subheading Acreage Limitation; Waters and Water Rights.

### Mining Locations

1. The discovery of mineral deposits and the performance of assessment work on withdrawn lands, in the absence of a location perfected by a valid discovery prior to the withdrawal, confers no right under

## WITHDRAWAL OF PUBLIC LANDS—Con.

### Mining Locations—Con.

the mining laws prior to the restoration of the lands from the withdrawal. Upon such restoration, the land becomes subject to veterans' preference rights under the act of September 27, 1944 (43 U. S. C. sec. 282).

### PLACER LOCATION; NON-METALLIFEROUS VOLCANIC CINDERS

2. Nonmetalliferous volcanic cinder aggregates on withdrawn public land which can be extracted and marketed at a profit may be acquired by a placer mining location under the mining laws upon restoration of the withdrawn land. Unless and until the lands are restored and are classified under section 7 of the Taylor Grazing Act, it is unnecessary to determine whether such lands are "valuable chiefly for stone" under the Timber and Stone Act.

### Potassium Prospecting Permits

3. An order withdrawing lands from all forms of appropriation under the public-land laws, including the mineral leasing laws, is effective against a prior application for a permit to prospect for potassium on such lands.

4. A withdrawal order which neither enhances nor diminishes existing rights does not deny equal protection of the laws to a prior applicant for a potassium prospecting permit.

### Special-Use Permit; Mineral Leases

5. Special-use permits are not issued by the Department for withdrawn lands not avail-

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WITHDRAWAL OF PUBLIC LANDS—Con.	Page	WITHDRAWAL OF PUBLIC LANDS—Con.	Page
Special-Use Permit; Mineral Leases—Con.		Temporary Withdrawal; Appropriation—Con.	
able under the public-land laws if the permit sought is for the development of minerals-----	467	the act of June 25, 1910 (36 Stat. 847), is an appropriation-----	176
Temporary Withdrawal; Appropriation		Withdrawals in Aid of Legislation	
6. Executive Order No. 6910 constitutes an appropriation of public land within the meaning of the Valentine Scrip Act, even though considered only as a temporary withdrawal for purposes of classification, and therefore bars the location of scrip. Congress has indicated that such a withdrawal under		7. A withdrawal in aid of legislation remains legally effective until revoked, even though no legislation has been enacted in 13½ years-----	466
		WORLD WAR I VETERANS, DISABLED	
		See Homestead, subheading Military Service.	